IN THE

Supreme Court of the United States

SUPREME COURT, U.S.
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OCTOBER TERM 1979

NO. 79-1841

GRANDDAD BREAD, INC.,

Petitioner,

v.

CONTINENTAL BAKING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Granddad Bread, Inc., petitions for writ of certiorari to review the judgment entered in this case on November 23, 1979 by the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is reported at 612 F.2d 1105 (Appendix A, infra, p. A-1).

The unreported order of the court of appeals remanding on the labor issue is in Appendix B, infra, p. A-16.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit was entered on November 23, 1979. Petitioner made timely petition for rehearing and suggestion for rehearing en banc, which was denied by order of the court of appeals on February 21, 1980 (Appendix C, infra, p. A-18). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I.

Whether a conspiracy in restraint of trade (group boycott) found by the jury to be violative of Sections 1 and 2 of the Sherman Act is nevertheless immune from antitrust enforcement because the evidence in support of the conspiracy included reference to the provisions of a collective bargaining agreement?

II.

Whether an illegal (violative of National Labor Relations Act Section 8(e)) secondary boycott provision, contained in a labor-management collective bargaining agreement receives immunity from attack under the Sherman Act by a showing that under labor law decisions construing 8(e) labor's motive for the provision was lawful work preservation, and management possessed a right of control over method of delivery of product; and in addition, are these questions for the jury upon proper instruction or rather for the court?

III.

Whether the criteria developed for determining the validity under the National Labor Relations Act of labor union-employer agreements to cease or refrain from doing business with third persons apply in determining under the Sherman Antitrust Act whether an agreement in restraint of trade between a labor union and wholesale bakeries to refuse to do business and boycott any business entity which engages in certain methods of distri-

bution is immune because of the labor exemption to the antitrust laws?

IV.

Whether the court properly concluded an agreement adopted by the union and wholesale bakeries that the bakeries would not enter any agreement resulting in dock delivery did not violate Section 8(e) of the NLRA.

V.

Whether in granting respondent's motion for judgment notwithstanding the verdict on the ground the jury should not have been allowed to consider Article VI of the collective bargaining agreement and that without that evidence there was insufficient evidence of conspiracy to support the remaining two jury findings, the district court erred.

STATUTES INVOLVED

The statutes involved are as follows:

1. Sections 1 and 2 of the Sherman Anti-Trust Act, 26 Stat. 209; 15 U.S.C. §§ 1 and 2; Appendix D, infra, p. A-19.

2. Section 6 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17; Appendix D, infra, pp. A-19 - A-20.

3. Section 8(e) of the National Labor Relations Act, 49 Stat. 452 as amended; 73 Stat. 543, 29 U.S.C. § 158(e), Appendix D, infra, pp. A-19 - A-20 A-19 - A-20.

STATEMENT OF THE CASE

A. Statement of the Facts

In May 1962, negotiations between the major wholesale bakeries in the Seattle area and the Teamster's International Union of Bakery Salemen Local 227 (hereinafter, "Union") culminated in a collective bargaining agreement. In Article IV the bakeries agreed not to dock distribute their products and to boycott sales to any business entity which engaged in dock pickup, dock delivery, or dock shipment. These terms are defined in Appendix E, infra, p. A-22.

Respondent admits the purpose and effect of Article IV included foreclosing the bakeries from

selling their products to independent jobbers and distributors. Brief of Appellant Continental Baking Company in the Ninth Circuit Cause No. 75-3484 at p. 39.

In addition to Continental, Hansen Baking Company (hereafter "Hansen"), American Baking Company (hereafter "American"), and Ruth Ashbrook Bakeries Corporation (hereafter "Ashbrook") signed the agreement along with the Union.

Subsequent to the adoption of Article IV, Granddad entered into business and competed as a wholesale bread distributor with Continental, Hansen, American and Ashbrook in the Greater Seattle area, which the economic evidence defined as the relevant geographic market. All of these wholesale bakeries and the Union were defendants and named co-conspirators below.

Granddad and these bakeries competed for sales in a separate, identifiable product market defined by the economic evidence as a 22-1/2-ounce loaf of white bread, with a total market of 2-1/2 million loaves sold each month.

Continental had a market share of 25% of sales, American, 25%, and Hansen, 20%. When Hansen went out of business in 1968, Continental's market share rose to 40% of total sales. Granddad's market share ranged from 5% to 10% from 1967 to 1971 when it went out of business.*

Prior to its incorporation in April 1967, Granddad's principals, George Vail and Gary Sandland, sold bread at wholesale to residences on bakery routes. They then began selling bread at wholesale to groceries stores in the Greater Seattle market area. Their wholesale price was considerably lower than the price charged by Continental and American and Hansen, and their business and volume grew.

Almost immediately after their entry into the wholesale market, the president of their Seattle bakery supplier, Ashbrook, told them that unless they would stop their practice of selling at

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* (Trial Record Vol. V, pp. 101-102, 113.)

wholesale to retail stores and confine their sales to residences that he would no longer supply them with products.[1] George and Gary refused, believing that they had a right to sell to whomever they pleased and on such terms as they pleased. Their supplier then carried out his threat and announced that he would sell no further products to them and that they would have to go elsewhere for their bread supply.

Bud Stiles, Ashbrook's president, stated his refusal to sell to Granddad was because of "outside interference like Associated Grocers." Associated was the largest customer of Ashbrook and a distributor in competition with Granddad. Ashbrook was permitted by a grandfather clause in Article IV to dock distribute to Associated Grocers. Associated Grocers could, in turn, dock distribute Ashbrook's products which it purchased to its own customers even though this involved Article IV's prohibition

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1 This and following numbered footnotes refer to Appendix F, infra, p. A-25, which contains excerpts from the trial record.

against the bakers entering any contract resulting in dock distribution because of the grandfather clause.

Whether Stiles' motivation in refusing to sell was because of Granddad's price competition* or because of Article IV** was submitted to the jury on undisputed instructions. In the jury's answer to Question 1(a) it found a conspiracy in the unlawful formation or application of Article IV. See Appendix G, infra, p. A-40. This finding resolves the motivation behind the refusal consistent with petitioner's contention Article IV was intended to freeze out price competition from independent wholesalers by creating a sheltered market.

After a brief period of difficulty with no supplier, George and Gary found an excellent and unlimited source of supply from outside the Seattle

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* Trial Record Vol. II, p. 174.
** Trial Record Vol. VI, p. 185.

market area. This outside bakery agreed to supply Vail and Sandland with all of the bread they wanted and at an attractive and favorable price. George and Gary began trucking the bread in from the outside bakery in Canada on a daily basis and selling it at wholesale to grocery stores in the Seattle market. Their volume developed so quickly that they had to arrange for a semi-truck van to bring the bread into Seattle each day. They were able to show an excellent profit despite the unusual long-haul trucking expense.

Approximately when petitioner achieved its highest volume of sales, Art Thompson, Continental's Seattle area manager, summoned Vail and Sandland to a meeting in his office. Thompson stated all the bread companies in the area were planning on going up on their prices again and he didn't want Granddad going out and getting any new business or doing anything that was going to harm

them in the way of their making any price adjustments.*

Granddad's wholesale price to the grocery stores continued to be approximately ten cents less than the wholesale price charged by Continental, Hansen, American, Ashbrook and the other large bakeries selling at wholesale in Seattle.[2]

The quality of bread offered by Granddad was excellent in all respects. With a quality product to sell at a ten-cent-per-loaf price advantage, Granddad's business became very successful, and the operation extended from individual grocery stores as customers to large grocery store chains. As soon as this happened, Granddad began to experience problems.

a. The business agent for the Union began a regular practice of visiting Granddad's headquarters to complain that they were "selling their bread too cheap" and that "they should get their prices up", and "he represented the

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* Trial Record Vol II, pp. 217-218; Vol. IV, pp 104-105, 116, 164-167.

bakeries" with whom Granddad was competing. He advised Vail and Sandland to "get into something legit," and on one occasion he offered Vail a job at "$300 per week" if Vail would "get out of the bread business." He approached Granddad's customers and described Granddad as "non-union." But when Vail and Sandland asked the business agent if they could join the union, the business agent told them that since they "owned their own business they did not have to join."[3]

b. At about this time (1968) Continental and the other major bakeries dropped their wholesale prices in the Seattle market so low that the Continental Seattle plant was operating at a $6,000 a month loss in the fourth quarter. This contrasted with a $40,000 monthly profit for the comparable period in 1967.[4] During this price war, one of the other bakeries in the Seattle area was marketing a loaf at a drastically low and predatory price ($.167 per large loaf) and in that company's documents later found, there was a handwritten notation next to the price reading,

"until price raise".[5] During this destructive wholesale price war the prices on the so-called "mainline" advertised loaves of the major bakeries (Wonder, Langendorf, and Sunbeam breads) was never lowered and all of the destructive price competition was being accomplished by the major bakeries with their so-called "secondary" loaves with labels such as "Tasty," "Kream-Krust," "Country Fresh" and the like. Documents established that these secondary loaves were identical with the mainline loaves with the exception of the paper wrapper.

c. Granddad also began to experience difficulty, particularly with Continental (Wonder Bread), in the form of interference with its customer relationships. The Continental representatives approached Granddad's customers and offered them a price concession on Continental products on the condition that they would stop purchasing any product from Granddad. Continental representatives also went to Granddad customers and refused to sell them any Continental products

(Twinkies, Wonder Bread, etc.) unless they would stop purchasing from Granddad.[6]

This type of interference continued - Granddad survived the price war and the other interference (although there was a marked decrease in Granddad's profit during that period), and in the spring of 1969 Continental and the other major Seattle bakeries stopped the price war and raised their price to more normal levels. It was approximately at this time the meeting took place referred to above. The Seattle manager of the Continental plant told Vail and Sandland:[7]

1. They were selling bread too cheap and that they should "get their prices up";

2. Acknowledged that all the companies had just raised their wholesale bread prices and stated that "all the companies are going to go up in price" [again];

3. If they did not go along with the price increase that Continental "had ways that they could take care of them";

4. If they didn't do what [Continental] wanted them to do they were going to "lower the price of bread to five cents a loaf like they did in other parts of the country";

5. If they did not go along, a profitable "backhaul" arrangement, which had furnished monthly income to Granddad, would be terminated.

Vail and Sandland were dumbfounded at the threats and the statements of Thompson, left the meeting, immediately made notes of what had been said,[8] and elected after some discussion to refuse to go along and to maintain their same independence with respect to their pricing because it was furnishing them a satisfactory profit margin and a good living. Also at this time, Granddad had acquired the K Mart account and had built Granddad's volume to 200,000 loaves per month.

Following the meeting with Thompson, the geographic use of the secondary loaves by Continental and other major bakeries in areas where Granddad attempted to compete intensified and Granddad's profit margin steadily declined until it

finally went out of the business altogether in 1971.

Documents painstakingly culled from the business records of Continental and the other defendants revealed:

1. The bakeries manipulated the price of the private and secondary loaves of breads using these as "fighting brands" while maintaining the identical price of the premium loaves;*

2. The defendant bakeries concealed the fact of the price discrimination by using invoices and records which did not identify the loaves sold;**

3. The defendant bakeries limited the supply of secondary loaves, using them only in geographic areas where Granddad was a competitive factor;***

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* See Trial Record Vol. III, p. 185 showing Continental's introduction of a new secondary loaf ("Country Style") which the documents identify as necessary to "meet competition" of Canadian bread (Trial Record Exhibit P32).

** Trial Record Vol. III, pp. 163-166.

*** Trial Reocrd Vol. I, p. 34, Exhibit P1.

4. Defendant bakeries varied the price of secondary loaves, lowering them in areas where Granddad was a competitive factor:*

5. The evidence established for a period of at least ten years prior to Granddad's entry into the Seattle market the Seattle area bread prices where higher than the national averages:**

6. The premium bread price was always the same from company to company:***

7. The evidence showed that Hansen, American and Continental virtually simultaneously raised their prices on private and secondary loaves from $.2368 per loaf to $.264 per loaf.**** This price rise in early 1969 was accomplished by each of the companies in the same peculiar manner: the selling price of $.2368 per loaf had been determined by

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* Trial Record Vol. I, p. 37, Exhibit P1; Vol. II, pp. 217-218.

** Trial Record Vol. V, pp. 44-45.

*** Trial Record Vol. III, p. 163, Exhibit P25; Trial Record Vol. II, p. 129, Exhibit P14, 15; Vol. II, p. 65.

****Trial Record Vol. I, p. 41, 42, 46, Exhibit P8; Vol. II, pp. 122, 123, Exhibit P14; Vol. III, p. 173, Exhibit P5, 7.

billing to the wholesale customer at $.296 per loaf less a 20% discount resulting in a $.2368 level. Each of the companies "lowered" the price from $.296 to $.264 per loaf, but each of the companies at the same time also eliminated the previous 20% discount resulting in an actual increase to $.264 while the billings reflected the apparent decrease.* Continental announced its price increase would be effective on February 24, 1969, but suspended the effective date of the increase until American and Hansen had put into effect the identical increase, so that there would be market disturbance.**

Although Continental and the defendant bakeries claimed that the price increase was motivated by an increase in cost of labor, production, and distribution, their own documents indicated no such increases at that time. It is significant that the

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* Trial Record Vol. V, p. 49, Exhibit P10.
** Trial Record Vol. III, pp. 174-176.

premium bread did not change in price and the price on secondary loaves was increased at this time.*

Documents from the files of Continental and defendant bakeries revealed the bakeries sold bread to the retailer at a retail price less a 20% discount. By fixing the wholesale price of bread, the bakeries thus necessarily directly affected the retail bread price.

The market studies and damage analysis in evidence on behalf of Granddad included parallelism,[9] price fixing,[10] monopolization,[11] and damage issues. The conspiracy claimed by Granddad was broader than the labor activities surrounding the labor agreement. The district court accordingly instructed the jury extensively as to the importance of motive, intent, and underlying purpose in determining whether a particular provision of the collective bargaining agreement (Article IV) was applied as part of a broader

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* Trial Record Vol. II, p. 131, Exhibit P8, P168; Vol. III, p. 173, Exhibit P10; Vol. V, pp. 49, 50.

conspiracy (Appendix I, Excerpts from District Court Instructions, infra, p. A-50).

Economic evidence of petitioner's expert witness indicated Granddad would have sold 200,000 loaves per month in the Seattle market absent the price discrimination practices of Continental and the other bakeries,* the bakeries damaged Granddad by their collusive depression of bread prices in the Seattle market between 1967 and 1969;** Granddad also sustained damages from the refusal to sell bakery sweet goods and hamburger buns.*** The jury returned a verdict of $150,000 for damages sustained in the four-year period from 1967 to 1971.

B. Proceedings and Decisions Below

After a nine-day trial, the case was submitted to the jury with written questions pursuant to Rule 49, Federal Rules of Civil Procedure. These and

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* Trial Record Vol. V, p. 97.
** Exhibit P113E-113H; Trial Record Vol. V, p. 60ff.
*** Trial Record Vo. V, p. 49-50.

the jury's findings of conspiracy against Continental are in Appendix G, infra, p. A-40. The jury found Continental had engaged in a conspiracy in the unlawful formation of or unlawful conduct in the application of Article IV of the collective bargaining agreement; that it had conspired in restraint of interstate trade and commerce in violation of § 1 of the Sherman Act apart from Article IV: and that it had engaged in a conspiracy to monopolize in violation of § 2 of the Sherman Act.

Judgment was entered against Continental. The district court, in denying Continental's motion for judgment notwithstanding the verdict, in its written opinion concluded the evidence was sufficient to support each of the jury's three conspiracy findings. (See Appendix J, infra, p. A-53 for the district court's ruling and opinion denying motion for judgment notwithstanding the verdict.)

On appeal, a panel of the Ninth Circuit remanded the case for reconsideration of the ruling on the motion for judgment n.o.v., "in the

light" of Connell Construction Co. v. Plumbers & Steamfitters Local, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975), as interpreted by the Ninth Circuit's own decision of California Dump Truck v. Associated General Contractors, 562 F.2d 607 (9th Cir. 1977) (See Appendix B, infra, p. A-16). The district court, after holding the case under advisement for seven months issued a brief order reversing itself and granting Continental's motion for judgment notwithstanding the verdict (See Appendix H, infra, p. A-47). Thereafter, the district court adopted verbatim fifteen pages of findings proposed by Continental and entered judgment of dismissal. On appeal this judgment was affirmed in Granddad Bread, Inc. v. Continental Baking Co., 612 F.2d 1105 (Appendix A, infra, p. A-1).

The court of appeals argued Article IV was valid under the NLRA because (1) its purpose was to preserve the union's jobs, a matter it held properly to be considered in a collective bargaining

agreement: (2) Article IV did not involve "prohibited secondary activity"; and (3) the bakers had the right to control methods by which their products were delivered to retailers.

It concluded Article IV was a valid work preservation clause and the jury should not have been allowed to consider "the labor-related aspects of the case." 612 F.2d at 1110.

And besides, the opinion indicated, Article IV did not have "the same type of direct effect on competition in a product market similar to those cases where the labor exemption has been found inapplicable."!

Having determinded the labor related evidence should not have gone to the jury, the court then concluded the remaining evidence was as a matter of law insufficient to prove a conspiracy under both § 1 and § 2 of the Sherman Act. The judgment dismissing the jury's verdicts and the case was accordingly affirmed.

REASONS FOR GRANTING THE WRIT

This case establishes a new substantive rule of exclusion from consideration by the trier of fact of "labor-related activities" when offered as an evidentiary link in the proof of a Sherman Act conspiracy. This rule as stated by the court is so pervasive it applies whether or not the evidence of labor-related conduct can first be shown to have violated the National Labor Relations Act (NLRA).

A group boycott here found by the jury to violate § 1 and § 2 of the Sherman Act was held immune from antitrust enforcement because the evidence in support of the conspiracy included references to provisions of a collective bargaining agreement. The petitioner contended the labor agreement violated the NLRA, and the jury was extensively instructed on this issue. By its verdict the jury found it did violate the NLRA, but the court's decision applies whether or not there was such a violation.

The issue presented is whether labor law decisions construing the NLRA are appropriate

precedents in a Sherman Act case for determining a conspiracy in restraint of trade and to monopolize. Here the Ninth Circuit applied the employer's "right to control" test developed by the NLRB as a basis for validating a group refusal to deal claimed to be motivated by work preservation. The Ninth Circuit's [incorrect] decision that the union's work preservation motive did not involve "prohibited secondary activity" under the NLRA formed the basis of its conclusion that Article IV was immune from consideration under the Sherman Act case as a matter of law.

This decision is that labor law precedents under the NLRA for measuring employer-union conduct supersede conspiracy rules evolved under the Sherman Act. This amounts to a far reaching extension of the scope of the NLRA and sharply limits the policy of the Sherman Act. The decision is in conflict with the reasoning and general principles laid down by this court for dealing with anti-competitive conduct under the Sherman Act involving collective bargaining in Allen Bradley

v. Electrical Workers, 325 U.S. 797, 89 L. Ed. 1939, 65 S. Ct. 1533 (1945); United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965); and Meatcutters v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965). These decisions require "labor related" anti-competitive conduct claimed to be part of a "broad substantive conspiracy . . ." in violation of the antitrust laws be measured by the Sherman Act rather than by principles developed under the NLRA relating to unfair labor practices.

Connell Construction Co. v. Plumbers & Steamfitters Local, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975), was cited by the Ninth Circuit as the reason for its remand of this case on the labor issue. However, in the Connell case the Court expressly did not rule whether the labor exemption would have applied had the restraint there involved been included in a collective bargaining agreement. The Connell case held that NLRA remedies for secondary activities made unfair labor practices under 8(B)(4) of the NLRA are not

exclusive. The Court there pointed out, "There is no legislative history . . . that Congress thought allowing antitrust remedies . . . would be inconsistent with the remedial scheme of the NLRA." The Court in the Connell case, therefore, did not address itself to the "significance . . . for antitrust suits based on those secondary activities prohibited by § 8(B)(4) of NLRA remedies." 421 U.S. 616, 634.

By no stretch of the imagination can the Connell decision constitute a precedent for immunizing conduct prohibited by the Sherman Act as conspiratorial activity because such conduct in the totally different context of the NLRA is not an unfair labor practice. The decision by the Ninth Circuit reaches beyond any territory charted by this Court in Connell and the other cases dealing with labor's exemption from the antitrust laws.

Resolution of the issues here merits consideration by the Court. Much uncertainty surrounds the application of labor's exemption to the antitrust laws. The Solicitor General in litigation now

pending before this Court has stated "The proper scope of the labor exemption from the antitrust laws has been a vexing issue for decades". Memorandum for the United States as Amicus Curiae, filed by Solicitor General on November 30, 1979 in International Longshoremens Assn. v. Consolidated Express, Inc., No. 78-1902 in the Supreme Court at p. 4.

In the Longshoremens litigation, in 78-1902, the Solicitor General pointed out all the parties contended the Third Circuit committed substantial error in formulating "a new test for the labor exemption where the challenged anti-competitive conduct has previously been found to violate the labor laws." Ibid at p. 4. In that case the United States Court of Appeals for the Third Circuit itself acknowledged its decision was made in a terra incognita involving labor policy considerations "which the Supreme Court has not yet addressed." Consolidated Express, Inc. v. New York Shipping Association, Inc., 602 F.2d 494 (3d Cir. 1979).

In a related case (New York Shipping Assn. v. Consolidated Express, Inc., Supreme Court No. 78-1905, the Court is asked to resolve three questions of national labor and antitrust policy involving the non-statutory labor exemption from the antitrust laws in a collective bargaining context.

This case presents a question which is at the very core of the widespread industrial disputes indicated by those and other cases now in this Court. To what extent is anticompetitive conduct claimed to have occurred in the exercise of labor's right to preserve jobs circumscribed by the antitrust laws? What is the effect, if any, on such anticompetitive conduct of its status under the NLRA in a Sherman antitrust case?

This case presents a clearcut issue of first impression. The issue arises out of a fully litigated jury trial. The jury, on undisputed instructions on the labor issue (Appendix I, infra, p. A-50), returned a finding Continental

violated § 1 of the Sherman Act by means of a claimed "work preservation" clause in a collective bargaining agreement that Continental claimed was immune under the labor exemption.

The jury also returned two other conspiracy findings against Continental apart from the collective bargaining agreement for violation of § 1 of the Sherman Act and for conspiring to monopolize in violation of § 2 of the Sherman Act. These two findings of the jury were vacated because of the supposed absence of a conspiracy between the union and Continental. Having vacated the judgment because the jury should not have been allowed to consider the labor related evidence, the court then concluded that without this evidence there was no conspiracy.

An analysis of Article IV quickly reveals it is a contract in restraint of trade. The union and employer bakeries agreed to boycott business entities or employers outside the bargaining unit which engage in dock distribution.

Respondent is compelled to admit in Article IV the bakeries agreed not to do business with or sell to third-party business entities - entities which are totally outside the bargaining unit (Brief of Continental below in Cause No. 3484, United States Court of Appeals for the Ninth Circuit at p. 39 on the first appeal). The jury found it violated § 1 of the Sherman Act (Answer to Question 1(a), Appendix G, infra, p. A-40). Article IV foreclosed competitors from the market and was a component of the conspiracy to deny the product to any independent distributors, such as Granddad, whose selling price was less than the artificially high price established by the conspiracy.

The bakeries' agreement in Article IV not to sell to third parties outside the bargaining unit is a violation on its face of Section 8(e) of the NLRA.

"The thrust of this boycott agreement is secondary, and the provision is therefore contrary to the purpose as well as the letter of Section

8(e)." NLRB v. Joint Council of Teamsters No. 38, 338 F.2d 23 (9th Cir. 1964).

The agreement is not saved from the ban of Section 8(e):

> because it preserves the job opportunities of employees within the multi-employer bargaining unit by prohibiting subcontracting to any employer outside that unit. [If] this argument were accepted, the exception to Section 8(e) would permit precisely what the section itself was intended to prohibit:

Ibid.

The secondary provisions of Article IV are not saved from the prohibition of Section 8(e) because another part of the article may be directed to the employer in the bargaining unit and thus primary in effect. See NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 95 L. Ed. 1284, 71 S. Ct. 943 (1951).

Going only so far as the NLRA is concerned, the secondary boycott provision of Article IV(D) violates Section 8(e), which by its terms renders such a prohibited contractual provision null and

void on its face. There is no labor policy advanced by granting such a provision labor immunity under the Sherman Act when the NLRA accords it no protection even as part of a valid collective bargaining agreement. NLRB v. Pipefitters, 442 U.S. 507, 51 L. Ed. 2d 1, 97 S. Ct. 891 (1977).

But the error underlying the Ninth Circuit decision here is more fundamental than its misconception of the nature and effect of the secondary provisions of Article IV(D) under the NLRA. The error of the court is that it transposes NLRA standards of unfair labor practices in a collective bargaining context to resolve whether union-employer anticompetitive conduct constitutes a conspiracy under the Sherman Act. There is no warrant in the legislative history in Congress or the decisions of this Court for such a sweeping intrusion. It is commonplace under the Sherman Act that an act or agreement, legal itself, becomes illegal when it forms a part of a conspiracy. Allen Bradley, supra. Assuming arguendo, Article

IV(D) was not a Section 8(e) unfair labor practice that does not exempt it from being considered by the trier of fact as part of a broader conspiracy under the Sherman Act.

Article IV(D) was used to control price competition by foreclosing price-cutting competitiors from the market. The jury found an unlawful motive or purpose behind Article IV in violation of § 1 of the Sherman Act. This group boycott was a direct violation of the Sherman Act. Unless Article IV can be considered as part of a price-fixing conspiracy among the wholesale bakeries, the effect of the overall conspiracy cannot be demonstrated. To isolate the agreement and measure it by NLRA standards, and then remove it from consideration by the trier of the fact, eviscerates the conspiracy proof and thwarts the enforcement of the Sherman Act.

The conclusion of the court of appeals that Article IV did not have an effect on competition, cannot withstand scrutiny. The group boycott in

refusing to sell products has long been held by this Court to be in the forbidden category of restraints which:

> from their 'nature or character' were unduly restrictive and hence forbidden by both the common law and the statute. As to these classes of restraints, . . . Congress has determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred.

Klor's v. Broadway-Hale Stores, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959).

More to the point than the Ninth Circuit's labor law approach is that a union that conspires with an employer to lessen or restrict competition forfeits antitrust immunity. The paramount general intention of Congress in the Sherman Act was to preserve business competition over the narrower intention to prevent misapplication of the Sherman Act to labor unions. Allen Bradley, supra. Translating NLRA standards of measuring conduct to a Sherman Act determination does violence to this intention and the policy of Congress. All exemptions from the antitrust laws, including the labor

exemption are uniformly narrowly construed. Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979).

California Dump Truck v. Associated General Contractors, 562 F.2d 607 (9th Cir. 1977), cited by the first appeal panel as its reason for the remand, was not discussed by the second panel in its decision. (See Opinion of the Court, Appendix A, infra, at p. A-3.)

If the holding of California Dump Truck stands for the proposition "a valid collective bargaining agreement . . . by itself does not violate the antitrust laws," that case is perfectly in accord with the Jewel Tea case and other decisions of this Court. It is not a precedent giving labor immunity for anticompetitive conduct in a collective bargaining context, which forms a link in a larger conspiracy.

The Ninth Circuit's decision here is in direct conflict with Allen Bradley's reasoning that a collective bargaining agreement which although standing alone may not violate the Sherman Act,

must nevertheless be measured in the light of the Sherman Act's purpose of preserving business competition. Thus, Allen Bradley requires in a Sherman Act case the collective bargaining agreement be considered whether it is "but one element in a far larger program." The Ninth Circuit's holding here does violence to the law of conspiracy as applied in the Allen Bradley case. Meatcutters Union v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965), in dealing with the application of the non-statutory labor exemption in a collective bargaining context, is clear to distinguish that the case there was not a broad substantive one of a violation of the antitrust laws - whether there is a conspiracy or combination which unreasonably restrained trade, or an attempt to monopolize. In Jewel the collective bargaining agreement itself was under attack and the issue was not presented to the Court of a collective bargaining agreement as a link in a broader antitrust conspiracy.

Article IV did operate as a direct restraint on competition in the market. It foreclosed from competition a segment of that market - wholesale distributors who did business by dock distribution of their products. The naked conclusion of the Ninth Circuit is that:

> Article IV simply does not have the same type of direct and immediate effect on competition in a product market similar to those cases where the labor exemption has been found inapplicable.

The group refusal to sell here foreclosed price cutting competition and enabled the conspiracy to control retail prices. Article IV's effect on the market is no less direct than that which the law presumes of any group boycott under the Sherman Act, Klor's v. Broadway-Hale Stores, supra.

The lower courts determined the jury should not have been allowed to consider the "labor-related evidence" and set aside the Question 1(a) verdict. They held the "labor-related evidence" affected the jury's Question 1(b) (§ 1 Sherman Act conspiracy apart from Article IV) verdict and the

Question 4 (§ 2 Sherman Act conspiracy to monopolize) verdict. For that reason, and absent the labor-related conspiracy evidence, the court mistakenly concluded there was insufficient evidence of conspiracy and the Question 1(b) and Question 4 verdicts were therefore vacated.

If this petition is granted, petitioner will urge the error of the court in its conclusion as to the insufficiency of the evidence of conspiracy and the correctness of the court's intrusion into the inherently jury function of determining motive, intent and the existence of a conspiracy. This Court has provided federal courts with the standards by which they are to review federal jury verdicts consistent with the Seventh Amendment of the United States Constitution. Atlantic & Gulf Stevedores v. Ellerman Lines Ltd., 369 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780 (1962), rehearing denied, 369 U.S. 882, 8 L. Ed. 2d 284, 82 S. Ct. 1137. See Safeway Stores, Inc. v. FTC, 366 F.2d 795 (9th Cir. 1966) dealing with the sufficiency of

evidence of a conspiracy among the major wholesale bakeries in the Seattle market.

CONCLUSION

It is respectfully submitted this petition for a writ of certiorari should be granted.

RAYMOND H.SIDERIUS
CHARLES R. LONERGAN, JR
PATRICK W. CROWLEY
Counsel for Petitioner

APPENDIX A

OPINION OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANDDAD BREAD, INC. a Corporation, Plaintiff-Appellant,	)	NO. 78-3698
vs.	)	OPINION
CONTINENTAL BAKING CO., a Corporation, Defendant-Appellee.	)	

Appeal from the United States District Court
Western District of Washington

Before: HUFSTEDLER and ANDERSON, Circuit Judges, and GRANT,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

This antitrust case involves an appeal by Granddad Bread, Inc., (Granddad) from judgment n.o.v. in favor of Continental Baking Company (Continental). The court below found that Continental's activities were, in part, protected by the labor exemption to the antitrust laws, and that there was insufficient evidence to support liability under the other conspiracy theories. We agree and affirm the judgment of the district court.

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*The Honorable Robert A. Grant, Senior United States District Judge, Northern District of Indiana, sitting by designation.

I. PROCEEDINGS BELOW

Granddad, the plaintiff, originally brought this action against Continental and five other defendants, alleging conspiracy, monopolization, attempted monopolization, and price discrimination in the Seattle wholesale bread market. The other named defendants were Teamsters International Union of Bakery Salesmen, Local 227 (Local 227): Ashbrook Bakeries Corporation of Seattle (Ashbrook): Safeway Stores, Incorporated: American Bakeries Company, and Hansen Baking Company, Inc. All of the other defendants, except for Continental, settled with Granddad prior to trial.

After a nine-day trial, on February 19, 1975, a jury returned a special verdict against Continental. The jury found that Continental had not monopolized or attempted to monopolize any part of interstate trade in violation of Section 2 of the Sherman act. But the jury did find that Continental had engaged in a conspiracy with the original defendants in an unreasonable restraint of, and in an attempt to monopolize, interstate trade (Sherman Act Sections One and Two). The jury also found that Continental had engaged in price discrimination in violation of the Robinson-Patman Act.

After the adverse verdict, Continental moved for judgment n.o.v. and the district court granted it on the Robinson-Patman claim, but denied it on the Sherman Act conspiracy claims. Continental then took an appeal from the denial of its motion. Granddad never appealed from the Robinson-Patman ruling.

On December 14, 1977, a panel of this court entered an order remanding the case to the district court for reconsideration in view of the recent decisions involving the scope of the labor exemption of the antitrust laws. On remand, the court

below entered an order granting Continental's motion for judgment n.o.v. based on Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975), and California Dump Truck v. Associated General Contractors, 562 F.2d 607 (9th Cir. 1977). The district court concluded that the jury should not have been allowed to consider the labor-related aspects of the case, and, aside from the matters protected by the labor exemption, there was insufficient evidence to support antitrust liability. Granddad then brought this appeal.[1]

II. BACKGROUND

Traditionally, the bread produced by the major Seattle wholesale bakers was delivered by driver salesmen who were members of Local 227, and employees of the respective bakers. They were paid a salary plus a commission for the bread sold. They picked up the bread from the wholesale bakers and provided rack service[2] at the retail stores.

In 1960, one of the Seattle wholesale bakers, Ashbrook, began to sell its bread to a retail outlet pursuant to an agreement where the retail outlet had its own drivers (as opposed to members of Local 227) pick up and deliver the bread.

This incident became the focal point of negotiations when the collective bargaining agreement between Local 227 and the bakers came up for renegotiation in 1962. Local 227 insisted upon obtaining a provision which would prohibit any of the signatory bakers from using a delivery method which did not utilize Local 227 driver salesmen servicing the racks at the retail stores.

The bakers eventually agreed to the demands of Local 227. Article IV of the collective bargaining agreement prohibited the signatory bakers from having anyone else pick up and deliver their

products to retailers, except for members of Local 227 who were to continue providing rack service at the retail outlets.3/

Granddad's predecessor came into existence in 1963. Granddad was never a party to the collective bargaining agreement with Local 227. Granddad was not a baker, but was instead only a distributor which had to purchase its products from the wholesale bakers.

Granddad initially purchased its bread from Ashbrook. However, in 1964, Ashbrook refused to sell any more bread to Granddad unless Granddad terminated its wholesale selling to retail outlets and confined its sales to residences.

Unable to find another quality wholesale baker who would sell bread to them in the Seattle area for resale to retailers, Granddad found a baker in Canada. Thereafter, Granddad relied upon the Canadian baker as its source of supply.

During the damage period of 1967 to 1971, Granddad continued its distribution of bread to retail outlets. According to Granddad, the various defendants engaged in various predatory practices during this period for the purpose of driving Granddad out of business.

III. QUESTIONS PRESENTED

Granddad raises two principal issues on appeal. The first is whether Continental's participation in the formation or application of Article IV of the collective bargaining agreement came within the labor exemption to the antitrust laws. And the second question, apart from the labor evidence in the case, is whether there was sufficient evidence to support the jury's verdict that Continental had engaged in a combination or a conspiracy, either to monopolize or in restraint of trade.

IV. STANDARD OF REVIEW

There is a general policy disfavoring summary procedures in antitrust litigation because of the important role which motive and intent play in determining liability. Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962). Nevertheless, this policy only applies to pre-trial motions, not to post-trial motions such as the judgment n.o.v. which is involved in the present case. Cal. Computer Products v. Intern. Business Machines, ___ F.2d ___, slip op. at 2180 (9th Cir., June 21, 1979).

On appeal from a judgment n.o.v., this court must view the evidence in the light most favorable to the party against whom the motion is made. Wescott v. Impresas Armadoras, 564 F.2d 875 (9th Cir. 1977). A judgment n.o.v. should be granted only when the evidence permits one reasonable conclusion as to the verdict. Fountila v. Carter, 571 F.2d 487, 489-490 (9th Cir. 1978).

In order to benefit from the favorable inferences, the non-moving party must present substantial evidence to support its claim. California Computer, slip op. at 2180. This is defined as "evidence which a reasonable mind might accept as adequate to support a conclusion." California Computer, slip op. at 2180.

Our task on this appeal is the same as it was for the district judge, to determine whether there was "substantial evidence" in the record to support Granddad's antitrust claims.

V. THE LABOR EXEMPTION

Generally, organized labor has two types of exemptions from the antitrust laws; statutory and

non-statutory. Dump Truck, supra, 562 F.2d at 610. The statutory exemption is derived from the Clayton and the Norris-LaGuardia Acts where "specific union activities, including secondary picketing and boycotts, [are expected] from the operation of the antitrust laws." Connell Construction, supra, 421 U.S. at 621-622. This does not apply to concerted action or agreements between unions and non-labor parties. Id. The non-statutory exemption, which is more limited in scope, then comes into play. Id. The source of the non-statutory exemption is "the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."[4/] Id. at 622. It is the non-statutory exemption which is involved in the present case.

Granddad argues that Article IV of the collective bargaining agreement was "illegal and void" under the National Labor Relations Act. Therefore, according to Granddad, Continental cannot benefit from the protection of the labor exemption. Moreover, Granddad contends that the jury properly resolved this question and its verdict should not have been questioned.

The court below found that Article IV of the collective bargaining agreement was a valid work preservation clause and that the jury should not have been allowed to consider it as a basis for imposing antitrust liability against Continental. We agree.

Pursuant to Section 8(e) of the National Labor Relations Act, a contract or agreement between any labor organization and any employer under which the employer agrees to refrain from doing business with any other person is an unfair labor practice.[5/] 29 U.S.C. § 158(e). Despite the sweeping language of Section 8(e), the Supreme Court has held that primary work preservation clauses do not fall within the broad prohibition. Woodwork Manufacturers v. NLRB, 386 U.S. 612, 639 (1967).

The determination as to whether an agreement is primarily for work preservation depends upon whether it was entered into, or applied, for the purpose of preserving work traditionally performed by the union members or for some secondary purpose to satisfy union objectives elsewhere. NLRB v. Pipefitters, 429 U.S. 507, 511 (1977).

It is clear that Article IV was entered into for the purpose of preserving Local 227's jobs. In the Seattle area, members of Local 227 had traditionally picked up the bread from the wholesale bakers and delivered it to the retail establishments. They had traditionally serviced the retailer's bread racks for which they received extra compensation.

In 1960, one of the Seattle bakeries, Ashbrook, began selling to Associated Grocers and allowing Associated Grocers to send their own drivers to pick up the baked goods. As a result, this became a crucial issue when the collective bargaining agreement came up for renegotiation (between Local 227 and the wholesale bakers) in 1962. Local 227 realized that if the other bakeries adopted similar methods of distribution, then there would be substantial losses of union jobs and memberships. The bakers only agreed to Article IV after it became apparent that it was a strike issue to the members of Local 227.

Nevertheless, Granddad argues that the purpose behind Article IV was to injure or limit the business of others who were not signators of the agreement (an illegal secondary purpose). This contention is supported by neither the terms of the agreement nor the facts. Article IV contained a grandfather clause so that any baker which was then using a non-Local 227 delivery method (i.e., Ashbrook) could continue. Additionally, Granddad could not have been within the contemplation of the parties since it was not in existence at the time

that Article IV was made a part of the collective bargaining agreement.

Contrary to Granddad's assertions, there was no evidence which could support a finding that Article IV involved prohibited secondary activity, either in its original intendment or in its application. The preservation of union jobs was a matter properly considered in the collective bargaining agreement. The bakers had the right to control the methods by which their products were delivered to retailers. See Chamber of Commerce of U.S., etc. v. N.L.R.B., 574 F.2d 457, 462 (9th Cir. 1978). As Granddad admits, Local 227 never used Article IV in an attempt to organize Granddad's employees. See Connell, supra, 4211 U.S. at 626.

Granddad also argues that the district court correctly instructed the jury on the labor issue and that the findings of the jury should be final. Granddad, however, failed to introduce sufficient evidence to justify submitting the issue to the jury. The primary evidence before the jury was Article IV which was a valid work preservation clause in a collective bargaining agreement. There was also evidence showing that the parties to the agreement had abided by its terms. There was no evidence that the bakers or Local 227 had either entered into Article IV or used it to control the wholesale bread market or to injure competitors. The isolated instances of activity by the representatives from Local 227 are not sufficient to predicate a claim of antitrust liability against Continental. The jury should not have been allowed to consider the labor-related aspects of this case.

Article IV simply does not have the same type of direct and immediate effect on competition in a product market similar to those cases where the labor exemption has been found inapplicable. See e.g., Connell, supra, 421 U.S. at 623-626;

United Mine Workers v. Pennington, 381 U.S. 657, 666-669 (1965).

VI. COMBINATION OR CONSPIRACY

We must also consider the non-labor-related aspects of this case. The jury found that Continental had engaged in contract, combination or conspiracy, in unreasonable restraint of trade (aside from Article IV), in violation of Sherman Act Section One. Additionally, the jury found that Continental had engaged in a combination or conspiracy to monopolize trade in violation of Sherman Act Section Two. The court below found that the jury's consideration of the labor aspects of the case affected its determination of these issues. In granting judgment n.o.v., the district court held that "there was no evidence of any agreement between Continental and the Teamsters [Local 227] or any other alleged co-conspirators which could have damaged Granddad in the manner complained of in this action." We agree that Granddad failed to produce sufficient evidence to support the jury's finding that Continental had conspired or combined with any of the other wholesale bakers.

As noted earlier, the jury rejected Granddad's single firm theory of attempt to monopolize under Section Two, but it did return a verdict in Granddad's favor on the allegation of a combination or conspiracy to monopolize under Section Two. Although the essential elements of a Section One offense are substantially different than for a Section Two offense, when a combination or conspiracy is charged under Section Two, then a prima facie case under either section has the same prerequisite, that is, a showing of concerted action by the defendants.[6/] Granddad failed to produce sufficient evidence which could support a finding that Continental combined or conspired with any of the other wholesale bakers. Cf. Hallmark Industry v. Reynolds Metal Company, 489 F.2d 8, 13-14 (9th Cir. 1973).

Granddad claims that various instances of parallel behavior by Continental and the other wholesale bakers is sufficient evidence from which an agreement can be inferred. Continental and the other wholesale bakers maintained a two-tiered wholesale price structure, pricing "premium" loaves at an artificially high level and selling the secondary and private-labeled loaves at a much lower price. The court below found that uncontradicted testimony at trial explained the development of this merchandising technique and how it was unrelated to any alleged conspiracy against Granddad. Granddad also claims that there was destructive price war which resulted in a virtual simultaneous price increase in 1969. The district court found that Granddad did not introduce any evidence that Continental had charged unreasonably low prices, nor was there any evidence of the wholesale prices charged by other bakers or any agreement between the wholesale bakers. Granddad contends that it did offer evidence of the prices charged by the other bakers. Accepting Granddad's representations, we still cannot find sufficient evidence from which a jury could properly infer concerted activity which is within the reach of the Sherman Act. At best, Granddad was only able to show parallel action; this is not enough to establish any type of agreement. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 84-85 (9th Cir. 1969).

VII. CONCLUSION

In light of Granddad's failure to present substantial evidence supporting its claim, we conclude that the district court properly granted Continental's motion for judgment n.o.v.

AFFIRMED.

FOOTNOTES

1/ The district court had jurisdiction pursuant to 28 U.S.C. § 1337. This court has jurisdiction under 28 U.S.C. § 1291.

2/ This means that the driver actually brought the bread into the retail stores, displayed it on the grocer's shelves, and picked up the stale bread which had not sold.

3/ Article IV of the 1962 collective bargaining agreement provided as follows:

> Section 1. No employer, prior to the termination of this agreement, shall change its method of distribution in effect at its particular establishment on May 1, 1962.
>
> (A) There shall be no dock pickup, dock delivery or dock shipment (as hereinafter defined) except as were in effect at the particular employer's establishment on May 1, 1962.
>
> Section 2. Dock Pickup, Dock Delivery and Dock Shipment. As used in this Agreement:
>
> (A) Dock pickup means a customer of an Employer signatory to this Agreement taking delivery of bakery products at the dock of such Employer.
>
> (B) Dock delivery means an Employer signatory to this Agreement delivering bakery products by leaving them at the dock of the customer.
>
> (C) Dock shipment means an Employer signatory to this Agreement delivering bakery products by common carrier or contract carrier.

(D) While this Agreement does not undertake to regulate the volume of business done by each Employer with any of its existing customers, it is specifically agreed that each employer shall refrain from entering into any agreement or arrangement of any kind with any new or existing customer which shall result in the use of dock delivery, dock pickup or dock shipment of any bakery products; provided, however, any agreement in effect on May 1, 1962, which results in the use of dock delivery, dock pickup or dock shipment may be renewed.

Section 3. The Employer hereby recognizes the previously established past practice of members of Local Union No. 227 displaying the bakery products in retail establishments. All such methods of displaying merchandise shall continue in the future as they have in the past. Any dispute as to such procedure shall be subjected to the Grievance Procedure as established herein.

Section 4. There shall be no deliveries on a Sunday, Holiday, or on such other days on which regular deliveries are not made, except deliveries to boats or trains for out-of-city delivery, deliveries to box lunch companies, or emergencies. All such deliveries shall be made by members of the bargaining unit who are employees of Employers signatory to this Agreement. No person shall procure or haul bakery products from bakeries for resale on Sundays or Holidays or on such other days on which regular deliveries are not made.

Section 5. In the event of an emergency the Employer shall first telephone a representative of the Union for approval. If a

representative of the Union cannot be reached by telephone, prior approval shall not be necessary but the Employer shall record the time when he tried to telephone such representative and shall inform the Union Representative the next business day of the nature of the emergency and the time of his telephone call to the Union Representative.

Section 6. No salesman allowed to start delivery of bakery goods before five (5) o'clock a.m., and must be off the streets by four (4) o'clock p.m. Salesman's time to start when he begins loading. There shall be no loading before four (4) o'clock a.m. No salesman shall be allowed to wash or repair machines on Sundays.

Section 7. No Employer shall load or permit the loading of any truck irrespective of whether such employer owns the truck or not which shall leave the loading area prior to 4:30 a.m., to make retail or restaurant deliveries.

4/ The philosphy behind this was explained more fully in Connell, supra, where the Court said:

"The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business

competition based on differences in wages and working conditions. Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market." (citations omitted)

421 U.S. at 622-623.

5/ The full test of this section provides as follows:

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible [sic] and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any

employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

6/ Since there is no indication that the words "combination" or "conspiracy" under Section One are distinguishable from the words "combine" or "conspire" under Section Two, we treat them as stating an indentical requirement for the purposes of our discussion. See 2 von Kalinowski, Antitrust Laws and Trade Regulation (1979) 9-31 - 9-32 n.18.

The district court may institute such proceedings as it deems necessary to properly interpret the mentioned authorities. The aggrieved party may appeal from the judgment entered on this remand, using the original briefs and record wherever appropriate, together with such supplemental record and briefs as may be desirable.

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APPENDIX B

REMAND ORDER OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

CONTINENTAL BAKING COMPANY, Corporation, Appellant,	)	NO. 75-3484
v.	)	ORDER
GRANDDAD BREAD, INC., Appellee.	)	

Appeal from the United States District Court
Western District of Washington

Before: WRIGHT and KILKENNY, Circuit Judges, and HARRIS, District Judge.*

This cause is remanded to the district court for reconsideration of its order denying the motion for a jugment notwithstanding the verdict in the light of the Supreme Court decision of Connell Construction Co. Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), as analyzed and interpreted in the intervening decision of California Dump Truck Owners Association, Inc. v. Associated General Contractors of America, etc., et al., ___ F.2d ___, No. 76-1432 (CA9 October 5, 1977).

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*The Honorable George B. Harris, Senior United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C

ORDER OF COURT OF APPEALS DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRANDDAD BREAD, INC., Appellant,	)	NO. 78-3698
vs.	)	ORDER
ITT CONTINENTAL BAKING COMPANY, Appellee.	)	

Before: ANDERSON, Circuit Judge, and GRANT,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable Robert A. Grant, Senior United States District Judge, Northern District of Indiana, sitting by designation.

Shirley M. Hufstedler, a former judge of this Court, and now Secretary of Education, did not participate in this order.

FILED Feb. 21, 1980
Richard H. Deane
Clerk, U.S. Court of Appeals

APPENDIX D

STATUTES INVOLVED

The statutes involved are as follows:

1. Sections 1 and 2 of the Sherman Antitrust Act (15 USC §§ 1 and 2), 26 Stat. 209.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

2. Section 6 of the Clayton Act, 38 Stat. 731 and 738 (15 USC § 17).

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be

construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

3. Section 8(e) of the National Labor Relations Act, 49 Stat. 452 as amended; 73 Stat. 543, 29 USC § 158(e).

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry

affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

APPENDIX E

ARTICLE IV of 1962

Collective Bargaining Agreement

Method of Distribution

Section 1. No employer, prior to the termination of this agreement, shall change its method of distribution in effect at its particular establishment on May 1, 1962.

(A) There shall be no dock pickup, dock delivery or dock shipment (as hereinafter defined) except as were in effect at the particular employer's establishment on May 1, 1962.

Section 2. Dock Pickup, Dock Delivery and Dock Shipment.

As used in this Agreement:

(A) Dock pickup means a customer of an Employer signatory to this Agreement taking delivery of bakery products at the dock of such Employer.

(B) Dock delivery means an Employer signatory to this Agreement delivering bakery products by leaving them at the dock of the customer.

(C) Dock shipment means an Employer signatory to this Agreement delivering bakery products by common carrier or contract carrier.

(D) While this Agreement does not undertake to regulate the volume of business done by each Employer with any of its

existing customers, it is specifically agreed that each employer shall refrain from entering into any agreement or arrangement of any kind with any new or existing customer which shall result in the use of dock delivery, dock pickup or dock shipment of any bakery products; provided, however, any agreement in effect on May 1, 1962, which results in the use of dock delivery, dock pickup or dock shipment may be renewed.

Section 3. The Employer hereby recognizes the previously established past practice of members of Local Union No. 227 displaying the bakery products in retail establishments. All such methods of displaying merchandise shall continue in the future as they have in the past. Any dispute as to such procedure shall be subjected to the Grievance Procedure as established herein.

Section 4. There shall be no deliveries on a Sunday, Holiday, or on such other days on which regular deliveries are not made, except deliveries to boats or trains for out-of-city delivery, deliveries to box lunch companies, or emergencies. All such deliveries shall be made by members of the bargaining unit who are employees of Employers signatory to this Agreement. No person shall procure or haul bakery products from bakeries for re-sale on Sundays or Holidays or on such other days on which regular deliveries are not made.

Section 5. In the event of an emergency the Employer shall first telephone a representative of the Union for approval. If a representative of the Union cannot be reached by telephone, prior approval shall not be necessary but the Employer shall record the time when he tried to telephone such

representative and shall inform the Union Representative the next business day of the nature of the emergency and the time of his telephone call to the Union Representative.

Section 6. No salesman allowed to start delivery of bakery goods before five (5) o'clock a.m., and must be off the streets by four (4) o'clock p.m. Salesman's time to start when he begins loading. There shall be no loading before four (4) o'clock a.m. No salesman shall be allowed to wash or repair machines on Sundays.

Section 7. No Employer shall load or permit the loading of any truck irrespective of whether such employer owns the truck or not which shall leave the loading area prior to 4:30 a.m., to make retail or restaurant deliveries.

APPENDIX F

EXCERPTS FROM TRIAL RECORD

Footnote 1. (Refusal of Original Supplier to Deal) Tr. 2, p. 174.

Q Then what happened?

a Well, Bud Stiles come up on the loading dock and talked to us and told us that he no longer wanted us delivering bread down to Jack's Pay-Less because he had too many problems from outside interference like Associated Grocers and such, and he didn't want us to bring it down to Jack's Pay-Less no longer. He told me I could still deliver my own delivery route, but I couldn't sell to him no longer.

Footnote 2. (Low Price of Granddad Bread) Tr. II, p. 173, 179.

Q And how much did you sell it to Jack's Pay-Less for?

A We sold it to him for 20 cents a loaf.

Q What were you charging the stores for bread that you delivered in that manner?

A We were charging 18 cents . . .

Footnote 3. (Activities of Union Business Agent) Tr. II, p. 196, 197, 201; Tr. IV, p. 89.

Q Did he ever discuss any other questions about your conduct of business besides your pricing?

A Well, he come down there after we got the K-Mart account and he made me a job offer, me and my partner, of $300 a week if we would get out of the bread business and get into something else. He said, "Why don't you get into something legit?"

Q Did he ever discuss with you the question of your own personal unionization of yourself or your business?

A We mentioned union to him, but he always told me, he said, "Everything is okay. You don't have to be in the union."

Q Did you ever refuse any request by Joe Collins --well, did Joe Collins every demand that you join the union?

A No, he didn't.

Q Did you ever refuse any request from anyone that you join the union?

A No.

Q Did he give a reason to you in those conversations why he felt the price was too cheap?

A Well, he said that he represented the other bakers.

Footnote 4. (Price War - Continental Selling at a Loss) Tr. IV, p. 41-42.

THE COURT: (to Art Thompson) I must say that I think you have not been asked about the remarkable circumstance that in 1967 to 1971, the period in question, the last quarter of '68 is the only one in which a substantial drop in profits, profit dollars, occurred, in that entire four-year period. Do you not have some recollection of what happened in that period to cause that very substantial drop? . . .

THE COURT: Excuse me, yes. I see. But you have no recollection now at all as to how it came about that there was a change in your profit situation in that particular quarter of approximately $200,000 . . .

THE WITNESS: Well, the product was selling for a lesser price; as I recall, that's when we adjusted the price.

Footnote 5. (Evidence of Price Fixing Conspiracy in Ashbrook Documents) Tr. VI, p. 166-168; Ex P38.

Q I want to direct your attention to Line 23. What is the bread described there?

A 22-and a-half-ounce loaf of Tasty label white.

Q Now, opposite that over on the far right-hand there is a handwritten notation. What does that say?

A The extreme right-hand?

Q Yes.

A "until price raise."

Q What does that refer to?

A I would have no idea.

. . .

THE COURT: He is asking you, do those words "until price rise" or something of that kind. Is that it; are those the words you are speaking of, Mr. Crowley?

MR. CROWLEY: Yes.

A They mean nothing to me.

Q I want to ask you again, opposite numbers 5, 6 and 23 on that page, are they the same loaf of bread?

A The ingredients all have the same costs in them, so I would assume that all of those are standard 22-and-a-half-ounce loaves of white bread.

Q And then is it the same loaf of bread?

A In our white bread production, all of our white bread is made identically the same.

Footnote 6. (Interference by Continental with Granddad Customers) Tr. I, p. 14; Tr. VII, p. 55-56; Tr. IV, p. 216-217.

Lundstrom Market

Q Would it be a correct assessment to say, Mr. Lundstrom, that when the sale supervisor came in, he simply stated to you that you had enough bread and since you weren't selling enough Wonder, he was going to stop; would that be a fair assessment of what he said?

A No, it's exactly the way I told it in the beginning. We had no problems with the salesman or the supervisor until the problem came up about the Granddad bread. We had handled their bread for years and never had any problems until they came up with a high-handed way of literally telling me, "You either throw somebody else out or we are going to take ours out."

Jack's Pay-Less - Note: This testimony demonstrates the inaccuracy of the slip opinion's statement that ". . . Granddad did not introduce any evidence that Continental had charged unreasonably low prices."

Q I see, now, to get back to the conversations that you had with these individuals in your

store, from the ITT Continental Bakery, did you ever discuss further with them their requirements to do business with you and sell their products?

A Actually, they never gave me, I would say, a requirement. These fellows, they were trying to get the business by offering me -- first of all, they offered me more service and etc., which I told them was a ridiculous -- it didn't mean that much to us, and the next thing was, we will offer you the same price. I says -- well, I always felt the same price never does anybody no good. I know what generally happens from experience. But anyway, I told them no, this wasn't that important. So then because I knew them so well, it was like just conversation, and then possibly a week, two weeks later, two guys always the same two, would come in and they would say would an extra penney [sic] do you any good? They never did know what I was even paying. They never asked what I was paying. They just offered my a penney [sic] better than I was paying. I says, you know, it isn't that important because I know how many loaves we sell a day and how much that penney [sic] would mean, wasn't that big a deal. So then a little more time went on, and when I say a little time, a couple weeks, they says through conversation "Would two cents help you any better?" I said "No, it isn't that good a deal for us." Well, then, after that another period of time the same people, they come up with three cents.

Hinshaw's Market

Q And what did he say?

A Well, word for word I can't give it to you. I can just give you the meaning I got from it and that was --

THE COURT: You can say the substance of it, of what he said.

A The substance would be that if I would discontinue Granddad or they could have Wonder Bread, their cheaper label, whichever it was--I have forgotten what the brand name was on it at that time--if they could have an exclusive, they would give me a better price on their cheaper label.

Footnote 7. (Direct Testimony of Admissions of Price Fixing Conspiracy) Tr. II, p. 217-218; Tr. IV, p. 104-106, 164-167.

Vail (quoting Thompson).

A . . .Then he mentioned to me, he says about prices, he says that all the bread companies in the area were planning on going up on their prices again, and he didn't want us going out and getting any new business or doing anything that was going to harm them in the way of making their price adjustments, and he told me that if we didn't get the point across, if we didn't do what he wanted us to do, they were going to lower their price of bread to 5 cents a loaf like they did in other parts of the country. He said they had done it before and they would do it again if we didn't go along. He said, "We've got a good chance now to make a good living and everything, a lot of money," and he says, "We should all be in there and make money."

Q What did you say in response to that?

A I didn't know what to say. I didn't answer him yes or no because I was just surprised.

Sandland (quoting Thompson).

Q Now, did you ever have any conversation or discussions with Mr. Art Thompson, who is the manager of the Continental Bakery?

A Yes.

Q And when was that?

A In the spring of 1969.

Q And what was the reason for having that discussion?

A At the time before the discussion I didn't know what the reason was. He sent a memo down telling us to--he sent a memo in our bread truck through Art Taylor in Canada, telling us to call him or meet him.

Q What did you do?.

A I think George contacted him, and they set up the meeting, and we went to a meeting with Mr. Thompson.

Q And where was this meeting held?.

A In his office.

Q And who all was present?.

A George and I and Mr. Thompson.

Q And what did Mr. Thompson tell you at that time?

A He told us that all the bread in town, all the companies, were going to go up in price and that we should all go along with it and that if we didn't, he was going to take care of us.

Q Were those his words, "take care of you"?

A He said that they had ways that they could take care of us and in other parts of the country they went as low as 5 cents a loaf to get rid of you.

Q Did he discuss with you the subject of your backhaul arrangement with ITT Continental Bakery?

A Yes.

Q What did he say about that?

A He asked us if it was profitable, and we tried to say no, knowing what he was leading up to. But he asked us if it was profitable and how we were making out and everything. And that's what it was.

Q What did he say? Did he say that anything--

THE COURT: Don't suggest. Don't lead him. Ask what he said.

A Well, he said that all the companies were going up in price next week; that we should all be making some money and we could all go up. And he said that if we didn't go up in price, he had ways that they could take care of us. And then he said, "in some parts of the country we went as low as 5 cents a loaf to get rid of competition." And then he brought up the backhaul. And at that time I was getting pretty perturbed, about then. He started talking about the backhaul. I couldn't remember exactly what he said. He said, you know, what the backhaul meant to us. He asked us what it meant to us, inferring, you know, that he was going to take it away, but I didn't know. He didn't say those words.

Q I see. What did you say at the time?

A I was speechless.

Q Okay. Now, according to your version, what was said by Mr. Thompson? Did he say to you, is it your recollection that he said to you that, "We are going up; we are going to raise our prices."?

A I think exactly what he said was, "We are all going up and you might as well go along with us so we can all make some money."

Q Well, what I am particularly concerned about is the tense. He said, "We are going up next week, a few days later. We are going up"?

A I don't know whether he said "we're" or "we are." I can't tell you that.

Q I don't want to mess you up in contractions, but he was focusing on the future.

A Yes.

Q Did he tell you not to take the K-Mart account?

A Not the K-Mart; not to take any accounts, not to take any accounts; not to go up in price. And all during this meeting I was getting mad; I was getting perturbed. And then I felt after we come out of the meeting that we should do the exact opposite and not get in this price-fixing scheme.

Footnote 8. (Sandland Notes of Meeting with Thompson) Tr. IV., p. 196.

Q Mr. Sandland, this P-170, does this constitute a memo or a note or anything else that you received from anybody?

A I think this is a note that I just--I just made this myself to remind myself.

Footnote 9. (Economic Testimony on Parallelism) Tr. V, p. 123; Tr. VI, p 4; Tr. V, 48, 49.

A Well, parallelism in pricing would usually mean that all the firms in the industry would raise their price about the same amount at approximately the same time. But the circumstances in which this would happen--usually there would be some change in costs or something of that nature which would trigger the change in the prices.

A Do you want to define what you mean by "parallelism"?

Q Maybe we should, yes. Would you define it for me? As an economist what do you mean by that?

A Well, I think it's--rather than being just an economic term, it's pretty much a common sense term, meaning that prices move together, that the product of one company whose price changes may be at or near the same time the price of another company changes.

See also the court's instruction to the jury (Vol. Jury Instructions, p. 34, 35.)

Also in support of its conspiracy theory plaintiff relies upon simultaneous price changes by the Seattle bakers as evidence of an agreement among them to fix prices and eliminate Granddad competition. In raising this claim plaintiff has the burden of proof of showing by a preponderance of the evidence that there were such simultaneous price changes.

However, even if you should find that there were such simultaneous price changes, that fact standing alone would not necessarily suffice to sustain the conspiracy allegations made by the plaintiff. In fact, even if you were satisfied that one or more of the Seattle bakers set the price for its products with the intention of following the prices set by one or more of the other bakers, that fact in itself would not necessarily constitute evidence of a conspiracy.

Instead, proof of a price-fixing conspiracy requires a showing that the bakers actually agreed or had an understanding among themselves as to the price that they would each charge for their products.

Q First of all, apart from 113-A, are you aware of an increase in the wholesale price of bread in the Seattle market area in March of 1969?

A Yes, I am.

Q And how do you know that?

A Well, you have provided me documents of Continental Baking, Langendorf, Hansen Baking, which announce a change in the price wholesale of bread in the end of February and the beginning of March of 1969.

Q Now, do you have an opinion whether a price increase was a result of increased costs in raw material or labor or cost of production or distribution?

A At that particular time it is my opinion that the increase in wholesale price was not a result of an increase in any of those costs.

Footnote 10. (Economic Testimony on Price Fixing) Tr. VI, p. 79, 80.

Q Now, I want to ask you, do you have an opinion on whether there was parallelism or not in the time of the price increase in March, 1969, and please tell us your opinion and everything you base it on.

A Well, there is certainly parallelism. I think that is obvious. It's a question of whether there's more than parallelism. The letters from Continental and their cost sheets and the letter to sales personnel by Hansen and the letter to American Bakeries--from American Bakeries to their salesmen, all show the same peculiar increase in price, but yet a reduction in the wholesale cost. It all occurred at the same period of time. And the Continental Company changed the effective date after it was announced, . . .

MR BRUCE: Your Honor, there is no testimony in the record that Continental changed the effective date on which it was announced.

THE WITNESS: Continental, yes. Then on Exhibit P-5 it shows that the effective date of the price change was March 4, 1969.

Footnote 11. (Economic Testimony - Conspiracy to Monopolize) Tr. V, 99-101, 102.

Q We have been talking about bread and bakery products in the greater Seattle area. Now, you stated that you have an opinion or formed an opinion on the market share held by the plaintiff and by the defendnat [sic], ITT Continental, during the four-year damage period. Would you tell us what that opinion is?

MR. BRUCE: Can we have the basis for the opinion and not just a conclusion?

THE COURT: Yes, first lay the foundation.

Q All right; tell us what geographic area first, Doctor Bassett, that you have included in your testimony and your analysis on the greater Seattle market area.

A By the "greater Seattle market area," I am meaning sales in the counties of King, Pierce and Snohomish Counties.

Q And is that the area in which the bread wholesalers effectively compete with each other?

A Well, there is actually some competition outside that particular area, but that is the major area of sales.

Q What areas outside are there?

A Well, for instance, there's Bremerton over in Kitsap County; and the market area extends as far north as Bellingham and south into Olympia, but the largest part of the market is those three counties.

Q You are talking now about the independent wholesalers of bread.

A Yes.

Q Now, what is the product market involved when you use the term "market share"? What is the relevant product we are talking about?

A Well, the relevant product that I am interest [sic] in is standard white bread.

Q Now, did you form an opinion or reach a conclusion on the total market, as you have defined it, before reaching your conclusion on the percentages held by the plaintiff and the defendant during the dmamge [sic] years?

A Well, the relevant product that I am interested in is standard white bread.

Q Now, did you form an opinion or reach a conclusion on the total market, as you have defined it, before reaching your conclusion on the percentages held by the plaintiff and the defendant during the damage years?

A Yes, I did.

Q Tell us now what it is.

A How I reached it or what?

Q Yes; what your conclusion was, too.

A Well, I reached a conclusion on the total market by studying various documents that show the sales of bread in this particular area. Now, these documents would consist of Doctor Etchison's study for Continental, the market for Continental, Langendorf and Gai products in this particular area. The Seattle Times has in the past made some excellent studies of the bread market in the area by sampling consumers; and surprisingly enough, they went to the extensive trouble to design the sample in a statistically correct manner. They obtained market information on these particular areas. In addition I relied on documents that you provided me from Continental, Langendorf, Hansen, Ashbrook and--excuse me, not Ashbrook, but Hansen and Granddad.

Now, in addition to this I relied on studies that have been done estimating the per capita consumption of bread at a particular period of time. And by taking this per capita consumption of bread and compariing [sic] it with the population in the three county regions, it's possible to estimate what the total sales of that particular product would be at a given period of time.

Q And what was your conclusion on the total size of the market as you have described it, Doctor Bassett?

A I would estimate that the total market would be about two and a half million loaves of bread per month.

Q And what conclusion form [sic] your records did you reach on the relative percentages of the market during the damage period held by the defendant, ITT, and the plaintiff?

A Well, in this particular period of time the ITT Continental was supplying about 25 per cent of that particular category of white bread that was being sold by wholesale bakers. The amount that was being sold by Granddad would have been about 5 per cent of that particular market.

Q Now, as far as you have information on volume from Continental, what share of this market do they possess at the latest point in time that you have records for?

A Well, after this very large increase, the share of the market would be closer to 40 per cent, or very close to 40 per cent.

APPENDIX G

VERDICTS OF JURY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GRANNDAD BREAD, INC., a corporation, Plaintiff, vs. CONTINENTAL BAKING CO., a corporation, Defendant.	CIVIL NO. 9583 VERDICT OF THE JURY

The jury are directed to answer each of the questions below by writing the proper answer in the space provided therefore:

QUESTION 1 (a) Do you find it has been shown by a preponderance of the evidence that the defendant Continental Baking Company and one or more of the alleged co-conspirators (including American Bakeries, Ruth Ashbrook Bakeries, Teamsters Local No. 227, Safeway Stores, Hansen Baking, Abbotsford Bakery, and various individuals employed by these concerns) engaged in a contract, combination or conspiracy in unreasonable restraint of interstate trade or commerce in violation of Section 1 of the Sherman Act by reason of participation in unlawful formation or, or unlawful conduct in the application of, Article IV of the Collective Bargaining Agreement between the Teamsters Local No. 227 and the baking

companies listed above, which activities were not exempted from the antitrust laws by the National Labor Relations Act as being lawful work preservation action.

ANSWER

Yes
(Yes or NO)

QUESTION 1 (b) Do you find it has been shown by a preponderance of the evidence that the defendant Continental Baking Company and one or more of the alleged co-conspirators engaged in a contract, combination or conspiracy in unreasonable restraint of interstate trade or commerce (aside from Article IV of the Collective Bargaining Agreement discussed in part (a)) in violation of Section 1 of the Sherman Act?

ANSWER

Yes
(Yes or No)

QUESTION 2 Do you find it has been shown by a preponderance of the evidence that the defendant, Continental Baking Company monopolized any part of interstate trade or commerce in violation of Section 2 of the Sherman Act?

ANSWER

No
(Yes or No)

QUESTION 3 Do you find it has been shown by a preponderance of the evidence that the defendant, Continental Baking Company attempted to monopolize any part of interstate trade or commerce in violatin of Section 2 of the Sherman Act?

ANSWER

No
(Yes or NO)

QUESTION 4 Do you find it has been shown by a preponderance of the evidence that the defendant, Continental Baking Company and one or more of the alleged co-conspirators engaged in a combination or conspiracy to monopolize any part of interstate trade or commerce in violation of Section 2 of the Sherman Act?

ANSWER

Yes
(Yes or NO)

QUESTION 5 Do you find it has been shown by a preponderance of the evidence that the defendant, Continental Baking Company engaged in unlawful price discrimination in interstate commerce between different purchasers of commodities of like grade and quality in violation of Section 2(a) of the Clayton Act, as amended, commonly known as the Robinson-Patman Act?

ANSWER

Yes
(Yes or NO)

QUESTION 6 If your answer to any one or more of Questions 1(a), 1(b), 2, 3, 4 or 5 is "yes," do you find it has been shown by a preponderance of the evidence that one or more unlawful acts of defendant Continental Baking Company (and its co-conspirators, if any you have found) have been shown with reasonable probability to have proximately caused appreciable injury to the business or property of plaintiff?

ANSWER

Yes
(Yes or NO)

QUESTION 7 If your answer to Question 6 is "yes," what sum of money, if any, has been shown by a preponderance of the evidence to be a reasonable estimate of the amount necessary to fairly and fully compensate plaintiff for the injuries sustained by plaintiff as a direct and proximate result of one or more unlawful acts of defendant Continental Baking Company (and its co-conspirators, if any you have found) described in the questions numbered 1(a), 1(b), 2, 3, 4 or 5 to which you have answered yes? (Note: The court has instructed the jury that no amount of damages awarded to plaintiff for any single injury shall be duplicated and

that plaintiff shall be compenstated [sic] only once for each element of damage included in the final total award of damages.

ANSWER

$150,000.00
(Amount)

Dated this 19th day of February, 1975.

S/ Rex Smith
FOREMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GRANNDAD BREAD, INC., a corporation, Plaintiff, vs. CONTINENTAL BAKING CO., a corporation, Defendant.	CIVIL NO. 9583 ADDITIONAL VERDICT OF THE JURY

QUESTION 8: Do all jurors intend by their verdict that each individual antitrust violation found by the jury: Q-1(a) restraint of trade with Article IV, Q-1(b) restraint of trade without Article IV, Q-4 conspiracy to monopolize and Q-5 unlawful price discrimination, proximately caused plaintiff sufficient injury to produce the amount of damages specified in your verdict?

ANSWER

Yes
(Yes or NO)

Question 9: If your answer to Question 8 is "No", specify what amount of damages you find by a preponderance of the evidence was proximately caused by each violation you found established.

Violation 1(a)
(Restraint of trade with Article IV) _____
(Amount)

Violation 1(b)
(Restraint of trade without
Article IV)
_____
(Amount)

Violation 4
(Conspiracy to monopolize)
_____
(Amount)

Violation 5
(Unlawful price discrimination)
_____
(Amount)

Dated this 20th day of February, 1975.

S/ Rex Smith
FOREMAN

APPENDIX H

ORDER OF DISTRICT COURT GRANTING
JUDGMENT NOV
(Footnote 1 containing Questions to Jury
and its Answers omitted See Appx. G)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GRANNDAD BREAD, INC., Plaintiff, vs. CONTINENTAL BAKING CO., Defendant.	No. 9583 ORDER GRANTING CONTINTENTAL'S MOTION FOR JUDGMENT N.O.V.

The court has fully reviewed and carefully considered the supporting and opposing memoranda filed by the parties pursuant to this court's order of February 2, 1978. That order sought an interpretation and discussion of the decisions referred to in the Court of Appeals' order remanding this case to the district court for additional consideration.

Upon this consideration, the court is fully satisfied that the Supreme Court's decision in Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975), as analyzed and interpreted in the California Dump Truck Owners Association, Inc. v. Associated General Contractors of America, 562 F.2d 607 (9th Cir. 1977) applied to the facts in this particular case, require this court to grant Continental's Motion for Judgment N.O.V.

In this case the jury decided that each violation which it found under interrogatories nos. 1(a), 1(b) and 4, standing alone, caused Granddad the full amount of the $150,000.00 damages it was awarded.[1]

In light of the Ninth Circuit's holding in Dump Truck, supra, the jury should not have been permitted to consider Article IV of the Collective Bargaining Agreement as a basis for imposing antitrust liability on Continental. The Dump Truck decison confirms that Article IV was a valid work preservation clause and therefore could not form the basis of an antitrust claim since no evidence was presented that the clause was unlawfully formulated or applied. Therefore, this court must set aside the jury's verdict under interrogatory 1(a).

In the opinion of the court the remaining evidence is insufficient to sustain the jury's verdict under interrogatories nos. 1(b) and 4.

The precise correspondence between the damage amounts found on all three conspiracy theories strongly suggests that the labor-related aspects of the case -- which were the principal focus of the plaintiff's case -- affected the jury's determination as to all other aspects of the case. Moreover, aside from Article IV itself, there was no evidence of any agreement between Continental and the Teamsters or any other alleged co-conspirators which could have damaged Granddad in the manner complained of in this action. Accordingly, the court must set aside the jury's verdict under interrogatories 1(b) and 4 and therefore grant Continental's Motion for Judgment N.O.V. in all particulars.

On or before Monday, November 27, 1978, counsel for Continental shall serve and file proposed findings of fact and conclusions of law. Counsel for Granddad Bread may have until Monday, December 4, 1978, in which to serve and file any proposed correctins to the findings and conclusions submitted by Continental.

Appropriate findings of fact and conclusions of law will be entered by the court after receipt and review of the above stated papers.

IT IS HEREBY SO ORDERED this 16th day of November, 1978.

s/
GEORGE H. BOLDT
SR. UNITED STATES DISTRICT JUDGE

APPENDIX I

DISTRICT COURT'S INSTRUCTION ON LABOR ISSUE

The Plaintiff alleges that Continental and alleged co-conspirators unlawfully conspired in restraint of trade to limit the delivery techniques which wholesale bakers could utilize in the Seattle market when they agreed in 1962 to Article IV of the Collective Bargaining Agreement between the Teamsters Local 227 and the Seattle bakers.

With regard to that claim you are first instructed that a work preservation clause, such as the one incorporated in Article IV of the Teamsters' Collective Bargaining Agreement with the Seattle bakers, is generally authorized by the federal labor laws. Accordingly, the Teamsters insistence upon such a clause wuld not be unlawful.

I also instruct you that Article IV of the Collective Bargaining Agreement could form the basis for a conspiracy charge if you find by a preponderance of the evidence that the purpose underlying that article was a jointly shared desire and purpose of the Teamsters and the bakers to injure or limit the business of others who had not signed that agreement. On the other hand, if you conclude that Article IV was merely the result of the Teamsters protection of their own interest in maintaining job security of their members and that the bakers agreed to that article solely because it was insisted upon by the union for that purpose, and not as the result of any agreement between the union and the bakers to limit the business opportunities of others, you would [not] be entitled to find that it constitutes a basis for the conspiracy claimed by the plaintiff.

Your verdict with respect to this matter should not be based merely upon anticompetitive effects which you may believe arose from the adoption of Article IV. Even if such effects arose

from the adoption of that article, it cannot form the basis for a verdict for the plaintiff unless you find that the union was acting pursuant to the lawful interests of its members to preserve traditional jobs fairly claimable by the bargaining unit, and was in fact acting in concert with or as an agent of the bakers to boycott the plaintiff when it entered this agreement.

You have heard testimony to the effect that Mr. Collins, formerly an official of the Teamsters and one-time employee of Langendorf and an alleged co-conspirator, has expressed the opinion that Article IV of the 1962 Collective Bargaining Agreement not only benefited the union, but also benefited the signatory bakeries by standardizing the methods of distribution such bakeries could use in selling their products; and, therefore, eliminating the opportunity for one or more of these bakeries to gain a competitive advantage by offering a different distribution method. The credibility of this testimony is, of course, to be determined by you, the jury.

You have also heard that Mr. Collins' opinion was not shared by the bakeries themselves, that they believed Article IV would not be beneficial to them, that they strongly resisted the adoption of Article IV and that they agreed to accept it only after the union threatened a strike on the issue. This testimony likewise, as far as credibility or believability is concerned, is a matter for the jury.

However, whether or not you find that the bakeries felt Article IV would be beneficial to them and whether or not you find that Article IV eliminated competition among the bakeries with respect to their own methods of distribution, no finding of an antitrust violation can be premised solely on the existence of Article IV standing alone.

Under both the labor laws and the antitrust laws, it is a legitimate objective for a union like local 227 to seek to obtain uniform terms and conditions of employment from a multi-employer bargaining unit. And while it is true that the union benefits from such standardized agreements, precisely because they eliminate some forms of competition among the signatory employers based on terms and conditions of employment, this is not the kind of restriction on competition that violates the Sherman Act unless you find that Article IV was was [sic] entered into or used by the parties for anticompetitive purposes other than the union's independent desire to preserve jobs for its members.

APPENDIX J

Excerpt from Memorandum of the Honorable George H. Boldt, District Judge, dated June 25, 1975, denying Defendant's Motion for Judgment Notwithstanding the Verdict.

THE VERDICT

At the instance of the Court and with the approval of counsel, a form of verdict was submitted to and answered by the jury consisting of a series of questions concisely specifying each of the seven ultimate issues in the case, which were determined by the jury by either a "yes" or "no" answer to each question.

In the Court's instructions the jury was emphatically instructed and especially cautioned that no amount awarded plaintiff for any specific injury should be duplicated and that plaintiff should only be compensated once for each element of damage included in the final total award of damages. After the jury returned its verdict as to each of the seven questions presented and before the jury was discharged, at the instance of defendant Continental an additional verdict form was submitted to the jury for answers to Questions #8 and #9, for the purpose of removing any conceivable doubt as to the intent of the jury by its answer to Question #7, which awarded damages in the sum of $150,000.00. The admonition against duplication of awards in the total amount of damages was again stated in the second verdict form and orally emphasized by the Court.

The jury, by their answers to the questions submitted, in substance found as follows:

Question 1(a): That in violation of Section 1 of the Sherman Act, defendant Continental and others engaged in a contract, combination or conspiracy in unreasonable restraint of trade or

commerce by participating in the unlawful formation of, or unlawful conduct in application of, Article IV of the Collective Bargaining Agreement between Teamsters Local #227 and defendant Continental and other baking companies.

Question a(b): That defendant Continental and others engaged in a contract, combination or conspiracy in unreasonable restraint of trade or commerce aside from Artice IV of the Collective Bargaining Agreement referred to in Question 1(a).

Question 2: That it had not been shown by the evidence that defendant Continental attempted to monopolize any part of the interstate trade or commerce in violation of Section 2 or the Sherman Act.

Question 4: That in violation of Section 2 of the Sherman Act, it had been shown by the evidence that defendant Continental and others had engaged in a combination or conspiracy to monopolize a part of interstate trade or commerce.

Question 5: That in violation of Section 2(a) of the Clayton (Robinson-Patman) Act, defendant Continental had engaged in unlawful price discrimination in interstate commerce between different purchasers of commodities of like grade and quality.

Question 6: That plaintiff Granddad sustained appreciable injury to its business or property by reason of the antitrust violations found and determined by the jury.

Question 7: That by reason of the antitrust violations found and determined by the jury, plaintiff Granddad sustained damages in the total amount of $150,000.00.

Question 8: That by their first verdict, all of the jurors intended to find and determine that each of the particular antitrust violations found by the jury proximately caused plaintiff Granddad sufficient injury to produce total damages in the amount of $150,000.00.

(By the affirmative answer to the jury to Question 8, an answer to Question 9 was unnecessary)

JUDGMENT NOTWITHSTANDING THE VERDICT (N.O.V.)

The finding of facts, either upon direct or circumstantial evidence, or both, and the drawing of reasonable inferences upon the evidence considered as a whole, are solely the perogatives of the jury, the exercise of which should not be frustrated or modified by the Court except upon a clear showing of insufficient evidence to support a verdict in one or more specific particulars.

Defendant contends that there was no evidence either to support any of the antitrust violations found and determined by the jury; or to prove either injury or damages by reason of any antitrust violations of defendant. The word "no" is emphasized above because similar assertions are almost always made in support of N.O.V. motions, especially in conspiracy cases, often because counsel for movant can readily show that there is no direct evidence in the record sufficient to establish an alleged conspiracy. Even Circuit Courts have been reversed for making the same mistake as shown in Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 at 698-99 (1962), the Supreme Court decison cited in plaintiff Granddad's initial memorandum opposing N.O.V.:

> "It is Apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as

> a whole. United States v. Patten, 226 U.S. 525, 544 . . .; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." American Tobacco Co. v. United States, 174 F.2d 93, 106 (C.A. 6th Cir.). See Montague & Co. v. Lowry, 193 U.D. 38, 45-46."

Plaintiff Granddad quoted only the last two sentences of the above paragraph. In my opinion, the entire paragraph should be considered as a whole and therefore has been quoted in full above. It is clear from the memoranda of counsel for defendant Continental in support of their N.O.V. motion, that defendant's counsel followed the same procedure as that which the Supreme Court, in the first two quoted sentences, held improper when applied by a Circuit Court, and also defendant's counsel urges this Court not to follow the guiding rule as stated by the Supreme Court in the last two quoted sentences.

With the notable exception of the Electrical Industry Litigation, the experience of this Court in conducting the trial of a considerable number of criminal and civil conspiracy cases, direct evidence or even tidbits thereof, tending to show conspiracy, have been rare indeed, even when there was ample evidence which, when taken as a whole, justified jury inferences finding conspiracy had been proved by a preponderance of the evidence, or even beyond a reasonable doubt.

As the Supreme Court has indicated in the above quotation, Federal Judges at every level must review in detail the entire record in determining whether the direct and indirect evidence, considered as a whole, is sufficient to support a verdict finding existence of a conspiracy. Such a review almost always is a meticulous, tedious and very extended task.

In the present case, in addition to closely following and making notes on the evidence during trial, this Court has reviewed the record in detail and has considered all of the evidence as a whole for the purpose of determining whether there is evidence, which was sufficient to justify the jury in finding as it did, as to each of the antitrust violations found in the verdict. Based upon that review, this Court is satisfied: that the evidence is not sufficient to support the verdict as to the alleged Clayton (Robinson-Patman) Act violation by defendant Continental found by the jury in response to Question 5; and that in all other respects there is sufficient evidence upon which to sustain the verdict of the jury.

Neither specification in detail nor analysis of particular portions of the record will be attempted because (a) plaintiff Granddad's memoranda include numerous references to specific evidence in the record; (2) reasonable adequate specification and analysis would require an inordinately detailed and extended statement; and, (3), in my opinion, would serve no useful purpose because on appeal each judge of the reviewing Court will be required to closely examine the entire record to enable him to determine for himself whether or not the conclusions and rulings of this Court are in error in any one or more particulars.

Accordingly, upon its review of the record, the Court hereby rules upon defendant's Motion N.O.V. as follows:

That there was sufficient evidence to sustain the verdict of the jury with respect of conspiracy in restraint of trade as found by the jury in answering both questions 1(a) and question 1(b), that there is sufficient evidence in the record to sustain the answer of the jury to question 4 finding defendant chargeable with conspiracy to

monopolize; that there is not sufficient evidence in the record to sustain the answer of the jury to question 5 finding defendant chargeable with violations of the Clayton (Robinson-Patman) Act, which finding in the verdict is hereby set aside; that there is sufficient evidence to support the verdict of the jury in answer to questions 6, 7 and 8 in which the jury found that plaintiff sustained appreciable injury and sustained damages in the total of $150,000.00, which was proximately caused by each particular antitrust violation found by the jury without duplicating any amount included in the total award.

The offenses specified in verdict questions 2, 3 and 4 (page 2 hereof) have been underscored as a prelude to a brief statement of the basis for sustaining the verdict finding defendant Continental chargeable with conspiracy to monopolize by the answer of the jury to question 4 in the verdict.

At first glance, it might appear that the answers to questions 3 and 4 are inconsistent. However, (1) beyond question, it is clear from their answers to questions 1(a) and 1(b) that the jury found defendant Continental chargeable with engaging in a conspiracy in restraint of trade and commerce; and (2) that, upon the evidence, the jury could readily have found (a) that the conspiracy in restraint of trade also included an objective to monopolize and (b) that one or more acts or conversations, lawful in themselves, were performed or spoken by one or more of the conspirators with intent to further the monopoly objective; if so, the finding of conspiracy in the answer to question 4 was justified.

The distinction between engaging in a conspiracy which includes an objective to monopolize and attempting to monopolize, is perhaps a refinement not readily discernable.

An agreement to understanding of two or more persons to commit an unlawful objective is the essence of conspiracy; whereas an attempt to monopolize may be a single act or utterance by a single person. However, in order to constitute an attempt to monopolize, the act or utterance must be in furtherance of and "imminently threatens" accomplishment of an unlawful objective, which factor the jury could well have found not present in this case and therefore would not support a finding of attempted monopoly. See American Tobacco Co. v. United States, 328 U.S. 781 (1946) and Bowen v. New York News, 366 F.Supp. 651 (1973) and cases cited.

During the trial the Court was impressed with the obvious constant close attention to the evidence by all jurors, their perception of the meaning of the questions they deliberated upon and their reasoned answers thereto. Therefore, this Court has no difficulty in believing that the jury understood the distinction between conspiracy to monopolize and attempt to monopolize and gave effect thereto in their verdict.

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No. 79-1841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

GRANDDAD BREAD, INC.,
Petitioner,

v.

CONTINENTAL BAKING COMPANY,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent, Continental Baking Company ("Continental"), herein opposes the petition for certiorari filed on May 20, 1980, by Granddad Bread, Inc. ("Granddad").

QUESTIONS PRESENTED

1. Did both of the courts below err in concluding that a work preservation clause in a collective bargaining agreement between the Teamsters and the Seattle bakers could not serve as the basis for imposing antitrust liability upon the signatories to the agreement?

2. Did both of the courts below err in concluding that, aside from the collective bargaining agreement, there was insufficient evidence of any other agreement between Continental and other alleged co-conspirators to support the jury's findings of conspiracy?

STATEMENT OF THE CASE

Traditionally, all of the bakery products produced by the major wholesale bakers in the Seattle market, including Continental, were distributed by driver-salesmen represented by Teamsters Local 227. These employees delivered the products with "rack service" at the retail stores: They brought the products into the stores, displayed them on the grocers' shelves, and retrieved stales for return to the bakeries. (Tr. A 36).

In 1960, one of the bakers tried to change these working arrangements when it entered into a contract with a retailer under which the retailer's drivers, who were not members of Local 227, would pick up and deliver the bakery products. (Tr. A 21). This incident became the focal point of negotiations when the collective bargaining agreement between Local 227 and the bakers expired in 1962 and had to be renegotiated. (Tr. VI 182; IX 166-69). The new agreement, when finally signed after more than four months of negotiations, contained a new provision—Article IV (See Petn. A-22)—insisted upon by the union under threat of strike, which obliged the bakers to continue using the traditional "rack service" of Local 227 members in delivering and selling their bakery products. (Tr. IV 176-82). A "grandfather" clause allowed those bakers who had used different delivery techniques for some customers prior to the adoption of Article IV to continue using those delivery techniques for only those

specific customers. (Tr. A 22; IV 180-81; See Petn. A-4).

Granddad began its operations in 1963, after the 1962 collective bargaining agreement. (Tr. A 37-38). Granddad was not a baker, but instead purchased from bakers and resold to retailers through delivery techniques generally inconsistent with the "rack service" provided by Local 227 members. (See Petn. A-4). Since Granddad was not a customer of any baker prior to the adoption of Article IV, it could not qualify for the "grandfather" sales permitted by Article IV. Accordingly, it was unable to purchase bakery products from the wholesale bakers who had signed the collective bargaining agreement with the Teamsters.

In 1971, Granddad instituted this action in the United States District Court for the Western District of Washington charging Continental, four other bakers, and Local 227 with conspiracy in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and monopolization and attempted monopolization in violation of Section 2 of the Sherman Act. Subsequently, a price discrimination count under the Robinson-Patman Act, 15 U.S.C. § 13(a), was added to the complaint. Pursuant to a settlement, complaints against all the defendants, except Continental, were dismissed prior to trial. (See Petn. A-2).

Granddad's proof at trial focused in large part on the relationship between the bakers and the Teamsters and upon Teamster activities allegedly aimed at damaging Granddad's business. In support of its damage claim, Granddad identified three specific causes of its injury. First, although Granddad had been able to find a satisfactory Canadian supplier of bread, it was

unable to purchase other bakery products from that supplier. Since the Seattle bakers could not sell Granddad these items because of Article IV, Granddad claimed that it was the victim of a concerted refusal to deal. (Pl. Exh. 113H; Tr. V 65). Second, Granddad complained that but for the alleged harrassment of its customers by the Teamsters, purported threats of Continental directed at those customers, and the bakers' alleged price discrimination, it would have sold a much larger volume of bread. (Pl. Exh. 113G; Tr. V 41). Third, Granddad complained that the bakers and Teamsters had conspired to maintain a one cent per loaf lower price during a 16-month period, thus causing it to realize a reduced volume of revenues during that period. (Pl. Exh. 113G; Tr. V 41).

The jury rejected Granddad's claims that Continental had monopolized or attempted to monopolize the Seattle bread market, but rendered a verdict for Granddad on the conspiracy and price discrimination counts. (See Petn. A-2). The jury went on to determine that Granddad had suffered actual damages of $150,000. The district court subsequently entered judgment n.o.v. for Continental on the price discrimination count, but refused to set aside the jury's verdict on the conspiracy counts.[1]

Continental appealed the district court's refusal to set aside the conspiracy counts, arguing that the collective bargaining agreement could not serve as the basis for making Continental liable for the acts of the

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[1] The district court left standing the jury's damage award, trebling it to $450,000, adding an additional $50,000 for attorneys fees, but subtracting $100,000 reflecting Granddad's settlement with other defendants prior to trial. Thus, judgment was entered for Granddad in an amount of $400,000 plus costs.

Teamsters or other bakers.[2] Continental also argued that, aside from the collective bargaining agreement, there was no evidence of any agreement between the bakers or with the Teamsters that could give rise to the conspiracy alleged by Granddad.[3]

On December 14, 1977, a panel of the United States Court of Appeals for the Ninth Circuit, after receiving briefs and hearing oral argument, remanded the case to the district court for reconsideration of that court's denial of Continental's motion for judgment n.o.v. on the conspiracy counts. (Petn. A-16). In taking this action, the Ninth Circuit referred solely to intervening decisions involving the scope of the labor exemption from the antitrust laws, thus suggesting it had found Granddad's non-labor-related evidence insufficient to support the jury's verdict.

On remand, the district court entered an order granting Continental's motion for judgment n.o.v. The district court found that the jury should not have been allowed to consider the collective bargaining agree-

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[2] In attempting to meet Continental's arguments in the Ninth Circuit, Granddad recited, as it has in its petition to this Court, testimony given by its two principals to the effect that Continental's plant manager in 1969 attempted to persuade Granddad to join a conspiracy to increase prices in the Seattle market. As Continental argued below, such evidence was never related by Granddad to its damage proof. Also, there was no proof that such a conspiracy had succeeded. In any case, had there been a successful concerted effort of the bakers to raise prices in the Seattle market, Granddad would have profited from that effort.

[3] Continental also contended that in light of the jury's findings against Granddad on the monopolization counts and the trial court's judgment n.o.v. on the Robinson-Patman count, which was not appealed by Granddad, the damages awarded to Granddad were excessive and should be remitted to a much smaller figure.

ment as evidence of a conspiracy and that there was insufficient other evidence to support a conspiracy verdict. (Petn. A-47).

On November 23, 1979, the district court's judgment was affirmed by another panel of the Ninth Circuit. (Petn. A-1). On February 21, 1980, the Ninth Circuit entered an order denying Granddad's petition for rehearing and rehearing *en banc*. (Petn. A-18).

REASONS FOR DENYING THE WRIT

Granddad's petition characterizes the decision below as establishing a new exception to the antitrust laws—that a collective bargaining agreement immunizes all other antitrust liability associated with the activities of the employers and unions who have signed that agreement. That characterization is simply wrong.

As is clear on its face, the opinion of the Ninth Circuit correctly applied decisions of this Court defining the scope of the labor exemption from the antitrust laws and concluded that the collective bargaining agreement could not, standing alone, sustain Granddad's conspiracy verdict. Then, reviewing the evidence unrelated to the agreement and, like the district court, finding it insufficient, the Ninth Circuit affirmed the entry of judgment n.o.v. for Continental. This straightforward application of well established legal principles should not occasion the exercise of this Court's certiorari jurisdiction.

I.

It is settled that a multi-employer collective bargaining agreement is not subject to antitrust attack merely because it restrains competition. As this Court

held in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 664:

> "The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws . . . ." (Citations omitted).

This Court reached a similar conclusion with respect to other terms and conditions of employment in *Local 189, Amal. Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676.

As these and other cases show, collective bargaining agreements are immune from antitrust attack unless the plaintiff establishes that the challenged terms and conditions, either on their face or as implemented, do not regulate the employment relationship between the union and signatory employers in a manner consistent with federal labor policy. Collective bargaining agreements violate the antitrust laws only if they are unrelated to that relationship and seek to impose terms and conditions of employment on third parties or otherwise hamper their competition. *United Mine Workers* v. *Pennington, supra,* 381 U.S. at 665-666; *Local 189, Amal. Meat Cutters* v. *Jewel Tea Co., supra,* 381 U.S. at 688-697.

The type of provision in the collective bargaining agreement attacked by Granddad here is clearly consistent with federal labor policy. Thus, the Court held in *Fibreboard Paper Products Corp.* v. *NLRB,* 379

U.S. 203, 209, that union demands for preservation of "work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act [NLRA] requires employers and the representatives of their employees to bargain collectively." Subsequently, the Court held that collective bargaining provisions insisted upon by labor unions in an effort to preserve their traditional functions with the signatory employer are lawful under the NLRA. *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612.

To overcome these cases, Granddad argued below and contends here that Article IV of the collective bargaining agreement was not a valid work preservation clause, but instead was "a violation on its face of Section 8(e) of the NLRA." (Petn. 31). However, *National Woodwork* held that the only circumstances in which work preservation clauses might run afoul of the NLRA would be where the evidence establishes that the intent of the union was not "primary"—*i.e.,* sought by the union to preserve work traditionally performed by its members for the signatory employers —but was instead "secondary"—*i.e.,* designed to impact third parties by forcing the unionization of their employees or the imposition of union terms and conditions upon them. 386 U.S. at 620.

In *NLRB* v. *Pipefitters,* 429 U.S. 507, 525-526, this Court further articulated the distinction between a union's "primary" work preservation goals and illicit "secondary" objectives:

> "[T]he [NLRB] has continued to interpret and apply § 8(b)(4)(B) [of the National Labor Relations Act] to find an unfair labor practice, at least where the union employs a product boycott to claim work that the immediate employer is not in

> a position to award, and it has declined to find a violation where the employer has such power, *even if awarding the work might cause him to terminate contractual relations with another employer.* In the latter circumstances, the *cease-doing-business consequences are merely incidental to primary activity,* but not in the former where the union, if it is to obtain work, must intend to exert pressure on one or more other employers." (Citations omitted; emphasis added).

The Ninth Circuit properly followed the rule of *National Woodwork* and *Pipefitters* and found that Article IV was a valid work preservation clause not violative of Section 8(e) of the NLRA. (Petn. A-6/A-7). Continental clearly controlled the delivery work in question so that the union's objectives were primary. Thus, the clause did not involve prohibited secondary activity either in its original intendment or application. As *Pipefitters* makes clear, the fact that a work preservation clause may affect third parties does not render it unlawful secondary activity. Thus, the lower courts' decisions are entirely consistent with decisions of this Court and those of other circuits upholding the antitrust immunity of collective bargaining agreements.

II.

Apart from its unsuccessful attempt to prove the invalidity of the collective bargaining agreement, Granddad asserts that the Ninth Circuit also erred by letting its views as to the lawfulness of that agreement control its consideration of the rest of the evidence developed by Granddad in support of its case. Granddad's contentions in this regard are clearly belied by the Ninth Circuit's opinion in this case.

After discussing the status of Article IV under the antitrust laws and finding that "the jury should not have been allowed to consider the labor-related aspects of this case" (Petn. A-8), the court stated that it "must also consider the non-labor-related aspects of this case." (Petn. A-9). Thoroughly discussing those portions of Granddad's proof unrelated to the relationship between the bakers and the Teamsters and concluding that "[a]t best, Granddad was only able to show parallel action" between the bakers that was "not enough to establish any type of agreement" that could have injured Granddad (Petn. A-10), the Ninth Circuit affirmed the district court's entry of judgment n.o.v. for Continental. Patently, there is no substance to Granddad's contention that the Ninth Circuit allowed its view as to the lawfulness of the collective bargaining agreement to control its disposition of the other issues raised in this case.

Since Granddad has not briefed the issue of the sufficiency of the non-labor-related evidence, we need not deal with that question here. Continental does, however, note that Granddad merely seeks to have this Court review the concurrent findings of the two lower courts as to the insufficiency of this portion of Granddad's proof. This Court has repeatedly made it clear that it will not exercise its certiorari jurisdiction to resolve such factual issues. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, *aff'd on rehearing*, 339 U.S. 605; *Baker* v. *Schofield*, 243 U.S. 114; *Texas & Pacific Railway Co.* v. *Railroad Comm'n of La.*, 232 U.S. 338.

CONCLUSION

For all the reasons stated above, Granddad's petition for writ of certiorari should be denied.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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SUMMARY OF ISSUES

This Petition for Certiorari presents questions dealing with the appropriateness in a Sherman antitrust action of labor law decisions interpreting the National Labor Relations Act. Specifically does anti-competitive conduct (a group boycott) receive immunity from attack under the Sherman Act because labor's motive was lawful work preservation?

Is an agreement in restraint of trade that violates sections 1 and 2 of the Sherman Act to be judged within the labor exemption to the antitrust laws on the basis of National Labor Relations Act criteria for determining the validity of labor union-employer agreements to cease or refrain from doing business with third parties?

A judgment on three jury findings of conspiracy in violation of sections 1 and 2 of the Sherman Act found by the district court to be supported by substantial evidence was ordered vacated on the authority of Connell Construction Co. v. Plumbers & Steamfitters Local, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975) because the jury should not have been allowed to consider the "labor related aspects" of the case.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General does not challenge as inappropriate for review by this Court the central questions presented by the Petition for Certiorari. His argument assumes without authority that where evidence of a conspiracy in restraint of trade includes reference to the provisions of a collective bargaining agreement, the question of immunity of such a conspiracy from antitrust enforcement is to be determined by reference to labor law decisions. This is the central question tendered for review. This question has not been decided by this Court.

The Solicitor General adopts the proposition of the court of appeals that "the jury should not have been allowed to consider" "the labor related aspects of this case" "because Article IV [of the collective bargaining agreement] was a valid work preservation clause".

The court of appeals cited two labor cases, National Woodwork Manufacturers Ass'n v. NLRB (1967)*, 386 U.S. 612, 18 L. Ed. 2d 357, 87 S. Ct. 1250, and NLRB v. Pipefitters, 429 U.S. 507, 51 L. Ed. 2d 1, 97 S. Ct. 891 (1977). See opinion of the court Granddad Bread Inc. v. Continental Baking Company, (Pet. App. A-8, A-6 to A-7).

The Solicitor General states:

> The lawfulness of such agreements rests not on the absence of effects outside the bargaining unit, but on the objectives of the union in entering into the agreements.

Memorandum for the United States at pp. 3-4 pp. 3-4, citing the additional labor case, NLRB v. International Longshoremen's

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* The court in National Woodwork expressly stated it did not decide there the question of "the antitrust limitations, if any, upon union-employer work preservation agreements", or "where the workers carry on a boycott to reach out to monopolize jobs", at footnote 19, 386 U.S. 612 at 631. This is certainly the sense given to National Woodwork by NLRB v. Pipefitters, 429 U.S. at p. 528, f.n. 16, at p. 529-530.

Assn., ____ U.S. ____ 65 L. Ed. 289, 100 S. Ct. _____ (1980).

The memorandum of the Solicitor General is devoid of any legislative or decisional authority whatsoever construing the antitrust laws or otherwise supporting this proposition in an antitrust context as opposed to a case arising under the National Labor Relations Act*.

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* At p. 3 of his Memorandum, the Solicitor General argues Article IV does not violate §8(e) of the NLRA. Article IV was properly considered by the jury along with all the rest of the evidence tending to establish a consipiracy. Although there was no specific finding by the jury that Article IV violated §8(e) of the NLRA this conclusion can be inferred from the jury's answer to Question 1(a) (Pet. App. A-40) in response to the District Court's Instruction that "Article IV of the collective bargaining agreement could form the basis for a conspiracy charge if you find by a preponderance of the evidence that the purpose underlying that Article was a jointly shared desire and purpose of the Teamsters and the bakers to injure or limit the business of others who had not signed that agreement". Pet. App. A-50. Whether Article IV violates §8(e) or not does not preclude its consideration by the jury under the undisputed instructions on the labor issue.

The Solicitor General thus assumes without argument or citation answers to three of the central questions presented by this Petition for Writ of Certiorari*.

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* Questions Presented for Review I: "Whether a conspiracy in restraint of trade (group boycott) found by the jury to be violative of Sections 1 and 2 of the Sherman Act is nevertheless immune from antitrust enforcement because the evidence in support of the conspiracy included reference to the provisions of a collective bargaining agreement?" (Pet. p.2)

Questions Presented for Review II: "Whether an illegal (violative of National Labor Relations Act Section 8(e)) secondary boycott provision, contained in a labor-management collective bargaining agreement receives immunity from attack under the Sherman Act by a showing that under labor law decisions construing 8(e) labor's motive for the provision was lawful work preservation, and management possessed a right of control over method of delivery of product; and in addition, are these questions for the jury upon proper instruction or rather for the court?" (Pet. p.3)

Questions Presented for Review III: "Whether the criteria developed for determining the validity under the National Labor Relations Act of labor union-employer agreements to cease or refrain from doing business with third persons apply in determining under the Sherman Antitrust Act whether an agreement in restraint of trade

The Solicitor General assumes that a boycott provision in a collective bargaining agreement is immune from attack under the Sherman Act by showing that under labor law decisions labor's motive was lawful work preservation. (Memorandum of the United States, pp.3-4).

The Solicitor General's Memorandum also assumes without argument or authority that criteria developed in decisions under the National Labor Relations Act apply in determining under the Sherman Act whether an agreement in restraint of trade is immune because of the labor exemption to the antitrust laws. (Ibid.)

The analysis by the court of appeals and the assumptions of the Solicitor

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between a labor union and wholesale bakeries to refuse to do business and boycott any business entity which engages in certain methods of distribution is immune because of the labor exemption to the antitrust laws?" (Pet. p.3)

General are erroneous because their consideration of these two issues and the effect of Article IV in a Sherman Act conspiracy case is measured and circumscribed by the National Labor Relations Act and the labor cases construing its provisions.

The conclusion they reach that Article IV and the "labor related aspects of the case" must be withdrawn from consideration by the jury cannot be squared with the right of trial by jury which is "an essential part of the congressional plan" in a treble damage action under the Sherman Act, Beacon Theatres v. Westover, 359 U.S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959).

The labor policy established by the National Labor Relations Act and decisions interpreting it arise in a totally different context than the policy of the Sherman Act and decisions dealing with anti-competitive conduct involved in collective

bargaining under the Sherman Act. The decision here and the assumptions made by the Solicitor General in his brief do violence to the general principles laid down by this Court for dealing with anti-competitive conduct under the Sherman Act in a collective bargaining context. See Petition herein at pp. 25-27; pp. 33-37.

The Solicitor General ignores the question presented by petitioner - to what extent is anti-competitive conduct which occurs in the exercise of labor's right to preserve jobs circumscribed by the antitrust laws.

Anti-competitive conduct such as that implementing Article IV may or may not be valid under the National Labor Relations Act. It should not however be excluded from a jury's scrutiny when it forms a link in a price-fixing conspiracy which seeks to exclude price-cutting competitors from the market. Allen Bradley Co. v.

Electrical Workers, 325 U.S. 797, 89 L. Ed. 1939, 165 S. Ct. 1533 (1945).

The district court here instructed the jury that Article IV could be considered if:

> [Y]ou find that the union was acting pursuant to the lawful interests of its members to preserve traditional jobs fairly claimable by the bargaining unit and was in fact acting in consort with or as an agent of the bakers to boycott the plaintiff.

(Pet. App. A-51); and:

> [T]hat Article IV of the collective bargaining agreement could form the basis for a conspiracy charge if you find by a preponderance of the evidence that the purpose underlying that article was a jointly shared desire and purpose of the Teamsters and the bakers to injure or limit the business of others who had not signed that agreement.

(Pet. App. A-50).

The jury did find such a conspiracy existed, the district court found substantial evidence in the record to support each of the jury's conspiracy findings, and judgment was entered on them. (Pet. App. p. 53, 57-58)

That there was a boycott here has not been denied. See Pet. pp. 5-6. Respondent admits "the Seattle bakers could not sell Granddad these items because of Article IV" (Brief of Respondent at p. 4). Thus the boycott was directed at third parties who had not signed the agreement*.

Respondent could hardly deny there was a boycott in view of the express language of the agreement:

> [I]t is specifically agreed that each employer shall refrain from entering into any agreement or arrangement of any kind with any new or existing customer which shall result in the use of dock delivery, dock pick-up or dock shipment of any bakery products.

Article IV(D) Collective Bargaining Agreement of 1962, Pet. App. A-23.

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* This demonstrates the inaccuracy of the statement "Granddad could not have been within the comtemplation of the parties since it was not in existence at the time that Article IV was made a part of the collective bargaining agreement". Pet. App. A-7 - A-8.

The Solicitor General argues "the lawfulness of Article IV rests . . . on the objectives of the union in entering into the agreement" and "Local 227 had no objective other than preserving its members' jobs" (Memorandum of Solicitor General at p. 4).

This reasoning would eliminate any consideration of motives or purpose developed after the agreement was entered, or the intent, motive or purpose of the signatory bakeries and their subsequent conduct involving Article IV.

This argument demonstrates again the fallacious assumption underlying the Solicitor General's memorandum, that NLRA criteria control in an antitrust case.

The Solicitor General's reference to Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 69 S. Ct.

535, 93 L.Ed. 672 (1949) is singularly inappropriate. That case deals with a nonjury trial to the court and the setting aside of findings made by the district court. That decision is distinguishable and not in point here as Atlantic & Gulf Stevedores v. Ellerman Lines Ltd., 396 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780 (1962) clearly demonstrates. Ellerman deals with special interrogatories submitted to a jury and a judgment on the jury's answers which was partially reversed by the court of appeals. This Court stated:

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says, "no fact tried by a jury, shall be otherwise reexamined by any Court of the United States, than according to the rules of the common law". . .

(p. 359).

> As we recently stated in another diversity case, it is the Seventh Amendment that fashions "the federal policy favoing jury decisions of disputed fact questions. Byrd v. Blueridge Cooperative, 356 U.S. 525, 538." . . .

(p. 360).

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.

(p. 364).

The error underlying the "findings" of the district court is evident in its order granting motion for judgment n.o.v. (Pet. App. A-47 - A-48). The district court's conclusion "the jury should not have been permitted to consider Article IV of the collective bargaining agreement" was predicated on the premise "that Article IV was a valid work preservation clause and therefore could not form the basis of any antitrust claim, since no evidence was

presented that the clause was unlawfully formulated or applied" and "the remaining evidence is insufficient to sustain the jury's verdict under Interrogatories Nos. 1(b) and 4". No "finding" that Article IV was not "unlawfully formulated or applied" under labor law decisions can overcome its character as a group boycott, nor as noted above is it disputed the boycott was put into effect against third persons. See Pet. 24-25; 7-9.

The error is that the district court first made a determination that Article IV was "a valid work preservation clause" as that term is defined and understood under the National Labor Relations Act and then concluded that it should not have been placed in evidence before the jury. The district court then considered "the remaining evidence". This was clearly and substantially erroneous. The issue is not the validity of Article IV under the NLRA

but as the district court correctly instructed the jury whether Article IV in the context of "the remaining evidence" was used as a boycott to injure the business of nonsignatories and therefore was a link in a price-fixing conspiracy to exclude competitors*.

This process of reasoning was followed by the court of appeals which agreed "that Article IV of the collective bargaining agreement was a valid work preservation clause and that the jury should not have been allowed to consider it as a basis for imposing antitrust liability". (Pet. App. p. A-6) Having ruled Article IV out as evidence which the jury should not have considered because it was valid under the

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* Respondent acknowledges both the district court and the court of appeals first made a finding as to Article IV, standing alone and out of the context of the remaining evidence, and then proceeded to a finding based on the remaining evidence. Brief of Respondent at p. 6.

NLRA, the court of appeals then dealt with the "non-labor related aspects of the case". (Pet. App. p. A-9) Petitioner urges that this constitutes substantial error. Measuring Article IV standing alone by NLRA standards and then removing it from consideration by the jury would eviscerate the conspiracy proof and make it impossible to demonstrate the overall conspiracy. (Petition at pp. 34, 30-34). Questions of motive, purpose and intent do not become issues to be decided by the court because the evidence in support of the conspiracy includes references to provisions of a collective bargaining agreement.

The argument appearing at 2(b) (Memorandum for the United States at pp. 4-5) demonstrates the Solicitor General ignores or wholly fails to grasp the questions presented for review and the reasons for granting the writ presented by this petition.

The three conspiracy verdicts returned by the jury after having been found by the district court to be supported by substantial evidence, were vacated solely because of the erroneous conclusion of the district court and the court of appeals that Connell Construction Co. v. Plumbers and Steamfitters Local, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975) compelled this result. Connell however did not deal with a restraint in a collective bargaining agreement. The court expressly recognized this in stating "there can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement", 421 U.S. 625. The mistake in reading of Connell by both of the courts below is that because Article IV was included in a collective bargaining agreement and when measured by

NLRA was valid that therefore it was immune from consideration by the jury in a Sherman antitrust case. This issue is clearly presented in the petition for the writ under questions I, II and III presented for review. (Pet. pp. 2-4) The Connell case does not warrant such a conclusion which is contrary to the Decisions of this Court. Provisions of a collective bargaining agreement such as Article IV here and other "labor related" anti-competitive conduct should be admitted to be considered by the jury in determining whether or not there is a "broad substantive conspiracy" in violation of the antitrust laws. See Pet. 24-40.

Finally, the Solicitor General misstates petitioner's contention at p. 4 of his Memorandum:

> There is no reason to grant review of Granddad's contention that Article IV standing by itself may give rise to antitrust liability.

However petitioner stated:

> If the holding of California Dump Truck stands for the proposition 'a valid collective bargaining agreement . . . by itself does not violate the antitrust laws,' that case is perfectly in accord with the Jewel Tea case and other decisions of this Court. It is not a precedent giving labor immunity for anticompetitive conduct in a collective bargaining context, which forms a link in a larger conspiracy.

(Pet. p. 36)

It is within the public interest for the Court to grant this petition for certiorari. The three conspiracy findings of the jury which are basic and inherent subjects for jury determination involving motive, intent and purpose were held by the district court to be supported by substantial evidence. These findings were vacated solely on account of the mistaken application of Connell Construction Co. v. Plumbers & Steamfitters, Local 100, supra.

In so doing the court of appeals has effected a significant and erroneous

incursion by the use of labor law decisions into the policy and reach of the Sherman Anit-Trust Act. This confrontation between the Sherman Anit-Trust Act and the National Labor Relations Act should be resolved.

Respectfully submitted,

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No. 79-1841

In the Supreme Court of the United States

OCTOBER TERM, 1980

GRANDDAD BREAD, INC., PETITIONER

v.

CONTINENTAL BAKING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. Wholesale bakeries in Seattle, Washington, have long employed their own truck driver-salesmen to deliver bread to retail grocery stores. Those drivers are responsible for making "rack deliveries"—deliveries that require them to stock shelves and remove stale loaves of bread from their customers' stores—and are paid sales commissions as well as salaries. In 1960, one of the bakeries began to allow a retail store to pick up its bread at the bakery's loading dock. When the drivers' collective bargaining contract next came up for renegotiation in 1962, their representative, Teamsters Local 227, insisted on a provision prohibiting such "dock pickups," as well as dock deliveries or dock shipments. This effectively excluded all forms of delivery except

rack delivery (Pet. App. A-11 to A-12). Under the threat of a strike, the bakeries acceded to this provision, which became Article IV of the collective bargaining agreement.

Nine years later, petitioner Granddad Bread, Inc. ("Granddad"), a bread distributing company, sued Continental, four other bakers, and Local 227 for violations of the antitrust laws. It alleged that the defendants, by various acts including the adoption of Article IV of the collective bargaining agreement, conspired to restrain trade and to monopolize commerce in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2.[1] It also claimed that Continental had violated Section 2 of the Sherman Act by monopolization and attempted monopolization. Following a jury trial in the United States District Court for the Western District of Washington, Continental was found liable on the conspiracy charges and not liable on the monopolization and attempted monopolization charges (Pet. App. A-40 to A-42, A-59).[2]

The court of appeals remanded the case for further consideration in light of *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), and *California Dump Truck Owners Ass'n* v. *Associated General Contractors*, 562 F. 2d 607 (9th Cir. 1977) (Pet. App. A-16). The district court then entered judgment n.o.v. in favor of Continental, holding that Article IV was a "valid work preservation clause and therefore could not form the basis of an antitrust claim since no evidence was presented that the clause was unlawfully formulated or applied" (Pet.

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[1]The other defendants named in the complaint settled with petitioner before trial.

[2]Granddad also claimed that Continental had violated the Robinson-Patman Act. The jury agreed, but the district judge set aside the verdict (Pet. App. A-58). Granddad did not take an appeal from this ruling (Pet. App. A-2).

App. A-48). The district court also found that, "aside from Article IV itself, there was no evidence of any agreement between Continental and the Teamsters or any other alleged co-conspirators which could have damaged Granddad in the manner complained of in this action" (*ibid.*).

The court of appeals affirmed (Pet. App. A-1 to A-15). Although Granddad argued that Article IV was not exempt from the prohibitions of the antitrust laws because it violated the labor laws, the court concluded that the clause was legal under Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and that it had not been misapplied (Pet. App. A-6 to A-8). The court of appeals also agreed with the district court that there was insufficient evidence to support the jury's finding that Continental had conspired with any of the other wholesale bakers (Pet. App. A-9 to A-10).

2. In this Court, Granddad sets forth three related arguments: that Article IV violates Section 8(e) of the National Labor Relations Act (Pet. 24-25, 33); that Article IV, even if lawful under Section 8(e), is part of a broader antitrust conspiracy (Pet. 31, 37); and that Article IV, considered by itself, may be the basis for antitrust liability regardless of its legality under the labor laws (Pet. 24-25). None of these arguments merits consideration by this Court in the present posture of this case.

a. There is no merit to Granddad's assertion (Pet. 31, 33) that Article IV violates Section 8(e) of the National Labor Relations Act, because it has economic effects outside of the bargaining unit. Many lawful work preservation agreements have such effects. See, *e.g.*, *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 615-616 (1967); *NLRB* v. *International Longshoremen's Ass'n*, No. 79-1082 (June 20, 1980), slip op. 15 n.22. The lawfulness of such agreements rests not on the absence of effects outside of the bargaining unit, but on the objectives of the union in entering into the

agreements. *NLRB* v. *International Longshoremen's Ass'n, supra*, slip op. 12-15; *NLRB* v. *Pipefitters Local 638*, 429 U.S. 507 (1977). In the present case, both courts below found that Local 227 had no objective other than preserving its members' jobs (Pet. App. A-8, A-48). There is no need for this Court to review the concurrent findings of both lower courts. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).[3]

b. Granddad also argues that Article IV, even if lawful under Section 8(e), was part of a broader conspiracy "to control price competition by foreclosing price-cutting competitors from the market" (Pet. 34). Both the district court and the court of appeals, however, found insufficient evidence that Article IV was used in this manner, or that any conspiracy to eliminate Granddad existed (Pet. App. A-8 to A-9, A-48). While Granddad obviously disputes these findings, that factual issue does not warrant this Court's review.

c. Finally, there is no reason to grant review of Granddad's contention (Pet. 24-30) that Article IV, standing by itself, may give rise to antitrust liability, even though it does not violate Section 8(e). Petitioner did not so argue in the lower courts. The district court instructed the jury that "no finding of an antitrust violation can be premised solely on the existence of Article IV standing alone," and that Article IV would violate the Sherman Act only if "entered into or used by the parties for anticompetitive purposes other than the union's independent desire to preserve jobs for its members"

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[3]Even though an agreement is aimed at preserving jobs, it still may be an illegal secondary agreement if the employer does not have the right or power to award the work that the union seeks to secure. *NLRB* v. *Pipefitters Local 638*, 429 U.S. 507, 522-528 (1977). The right to control issue was not raised in the lower courts, however, and the court of appeals' observation that "[t]he bakers had the right to control the methods by which their products were delivered to retailers" (Pet. App. A-8) is dictum.

(Pet. App. A-50 to A-52). Granddad did not challenge that instruction on appeal. Instead, it sought reversal in the court of appeals following judgment n.o.v. on the ground that Article IV was illegal under the labor laws and therefore not exempt from the coverage of the antitrust laws. Granddad did not argue that the provision would violate the antitrust laws even if lawful under Section 8(e), and the court of appeals did not address that issue (Pet. App. A-6). There are no exceptional circumstances in this case warranting consideration of an issue that was neither raised in nor decided by the court of appeals. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

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[4]Petitioner correctly notes (Pet. 28) that in an amicus curiae memorandum opposing certiorari in *International Longshoremen's Ass'n* v. *Consolidated Express*, No. 78-1902, we described the question of the scope of the labor exemption from the antitrust laws as a "vexing issue." The difficulty of the question is all the more reason not to consider it in a case such as this, in which illumination from the lower courts' opinions is unavailable. Moreover, in the case cited by petitioner, the court of appeals based its ruling on the scope of the antitrust exemption on a finding that there had been a violation of Section 8(e). *Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 602 F. 2d 494 (3d Cir. 1979), judgment vacated, No. 78-1902 (June 30, 1980). No violation of Section 8(e) was found to exist in this case.